80-737

No.

Supreme Court, U. S.
FILED
NOV 5 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

VIGO G. NIELSEN, JR.
COUNSEL OF RECORD
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 362-1940
Attorneys for Appellants

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTIONS PRESENTED FOR REVIEW

1. Do the Provisions of a Berkeley Ordinance Limiting the Amount of Contributions to a Campaign Committee Supporting or Opposing a Ballot Measure in an Election Campaign Violate the First and Fourteenth Amendments to the United States Constitution?

2. Is There Any Interest So Compelling as to Warrant the Contribution Limit's Admitted Infringement on Appellants' First Amendment Rights of Speech and Association?

3. Can the Ordinance Be Upheld if Berkeley Has Failed to Meet Its Burden of Proving the Existence of a Compelling Governmental Interest?

PARTIES TO THIS APPEAL

Appellants Citizens Against Rent Control/Coalition for Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California non-profit association; Betty Geritz, Muriel Rosenkranz and Eva Floystrup were plaintiffs and appellees in the courts below. Appellees City of Berkeley, California, a municipal corporation; the Berkeley City Council; the Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission, were defendants and appellants in the courts below. There were no other parties.

TABLE OF CONTENTS

	Page
Questions presented for review	i
Parties to this appeal	i
Opinions below	2
Jurisdictional basis	2
Relevant constitutional provisions and sections of the ordinance	3
Statement of the case	4
Statement of the reasons why the questions presented are so substantial as to require plenary consideration by this court:	
The ordinance illegally restrains speech and association in an election campaign and the decision of the California Supreme Court directly conflicts with a July 11, 1980 opinion of the United States Court of Appeals for the Fifth Circuit	7
The questions presented are substantial	21
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases

Page

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 9, 11, 15, 16, 17, 21

C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) 18

Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980) 2, 12, 13, 15, 17, 19

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 3

Elrod v. Burns, 427 U.S. 347 (1976) 11

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 3

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 8, 9, 11, 13, 14, 15, 17, 18

Garrison v. Louisiana, 379 U.S. 64 (1964) 8

Healy v. James, 408 U.S. 169 (1972) 10

King Mfg. Co. v. City Council of Augusta, 277 U.S. 100 (1928) 3

Kusper v. Pontikes, 414 U.S. 51 (1973) 10

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) 20, 21

Mills v. Alabama, 384 U.S. 214 (1966) 8

NAACP v. Alabama, 357 U.S. 449 (1958) 9, 11

NAACP v. Button, 371 U.S. 415 (1963) 10, 11

Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal. App.3d 123, 131 Cal.Rptr. 350 (1976) 11

Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) 18

TABLE OF AUTHORITIES CITED

Constitution

Page

United States Constitution:
First Amendment ..... i, 2, 3, 7, 8, 9, 11, 20, 21
Fourteenth Amendment ..... i, 7

Ordinances

Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974):
Section 217 4
Section 219 4
Section 602 ..... passim
Section 604 ..... 4, 6
Section 700 4

Statute

28 U.S.C. section 1257(2) (1976) 3

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

Appellants Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California nonprofit association; Betty Geritz;

Muriel Rosenkranz and Eva Floystrup, submit their Jurisdictional Statement and respectfully request that probable jurisdiction be noted.

OPINIONS BELOW

The opinion of the California Supreme Court is cited as *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion appears as Appendix A.

The opinion of the California Court of Appeal, was cited (until vacated) as *Citizens Against Rent Control v. City of Berkeley*, 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979). The opinion appears as Appendix B.

JURISDICTIONAL BASIS

(i) Appellants filed for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint challenged the validity, under the First Amendment of the Federal Constitution, of section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) ("the Ordinance"),[1] which limited to $250 the amount of contributions to campaign committees supporting or opposing measures on the Berkeley municipal ballot. The Superior Court issued a temporary restraining order and later, a preliminary injunction against enforcement of section 602 of the Ordinance. The Superior Court granted summary judgment for appellants holding section 602 unconstitutional.[2] The California Court of Appeal, First Appellate

---

[1]Unless otherwise indicated, all references to "sections" are to sections of the Ordinance; the Ordinance appears as Appendix F.

[2]The Order Granting Summary Judgment, the Judgment, and the Notice of Entry of Judgment appear as Appendices C, D and E, respectively.

District, Division Two, unanimously affirmed the trial court. The California Supreme Court, in a 4 to 3 decision, reversed the courts below and sustained the validity of section 602 against appellants' constitutional attack.

(ii) The judgment of the California Supreme Court was rendered on August 7, 1980. Appellants filed their Notice of Appeal in the California Supreme Court on October 28, 1980.[3]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2) (1976), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207, n. 3 (1975); *King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100 (1928); *Coates v. City of Cincinnati,* 402 U.S. 611, 612 (1971).

RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE

The relevant constitutional provision is the First Amendment to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the Berkeley Ordinance are:

> Section 602: No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person

[3] A copy of the Notice of Appeal appears as Appendix I.

with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

Section 219: "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

Section 217: "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Section 604: If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Section 700: Any person who knowingly or willfully violates any provision of this ordinance is guilty of a misdeameanor punishable by a fine for each violation of three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

STATEMENT OF THE CASE

Appellants contend that section 602 is unconstitutional on its face, impermissibly violates appellants' fundamental rights of speech and association, is not supported by any

compelling governmental interest, and that no such interest was demonstrated by the City of Berkeley. Appellants raised these contentions at each stage of the proceedings below: in their verified complaint; in their pleadings in support of their applications for temporary restraining order and preliminary injunction (successfully); in their pleadings in support of their motion for summary judgment (successfully); and in their briefs before the California Court of Appeal (successfully) and the California Supreme Court (unsuccessfully).

The Ordinance was enacted in 1974. At the April 19, 1977 Berkeley Municipal election, Berkeley voters were asked to vote on a complex ballot measure, Measure B, which would have imposed a strict system of rent controls upon thousands of rental units in Berkeley. The issue was controversial and groups of citizens formed to support and oppose Measure B. Many citizens formed an unincorporated association (campaign committee) under Berkeley and California law, to oppose the passage of Measure B; they called themselves Citizens Against Rent Control ("CARC") and are appellants in this case. CARC solicited and accepted campaign contributions, hired an experienced campaign manager, published campaign literature and generally conducted an active campaign against Measure B. Supporters of Measure B also conducted an active campaign.

More than a month before the election, a controversy arose concerning Berkeley's intent to enforce the contribution limit contained in section 602. CARC believed that the City advised campaign committees that it was not going to enforce section 602, and relying on that belief, CARC solicited and received a total of $18,600 in contributions above the $250 limit from numerous "persons" including appellants Mason-McDuffie and the Berkeley Board of

Realtors. A week before the election, appellee The Berkeley Fair Campaign Practices Commission, ordered CARC immediately to surrender the $18,600 to the City treasury, pursuant to section 604 of the Ordinance. Appellants, faced with the loss of badly-needed funds at the most crucial juncture of an important election campaign, filed suit for injunctive and declaratory relief, obtained a temporary restraining order against enforcement of sections 602 and 604, and utilized the $18,600 during the last days of their election campaign. The measure was defeated. Appellants, faced with an $8,000 post-election campaign debt, amended their complaint below to seek the right to collect amounts greater than $250 to retire the debt after the election.

Appellants submitted evidence below, in the form of affidavits and declarations, that the $18,600 was necessary to conduct an effective campaign against Measure B; that CARC solicited and received contributions in excess of $250 including contributions from certain other appellants; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the restrictions imposed by section 602; that to wage an effective campaign against the complex rent control measure, expensive research and voter contact had to be achieved; and that a professional campaign manager had to be hired and paid.

The only evidence submitted by appellees at any stage of the proceedings below, was the declaration of Edythe Campbell, Berkeley City Clerk.[4] This declaration merely states that appellee, The Berkeley Fair Campaign Practices Commission, had demanded that CARC surrender the $18,600. It contains no proof or offer of proof of any compelling governmental interest to justify section 602.

---

[4]The Campbell Declaration appears as Appendix G.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THIS COURT:

THE ORDINANCE ILLEGALLY RESTRAINS SPEECH AND ASSOCIATION IN AN ELECTION CAMPAIGN, AND THE DECISION OF THE CALIFORNIA SUPREME COURT DIRECTLY CONFLICTS WITH A JULY 11, 1980 DECISION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

This case involves important questions concerning the power of state and local governments to limit contributions by individuals and associations to campaign committees supporting or opposing ballot measures. The California Supreme Court has sustained the validity of an ordinance of the City of Berkeley which limits such contributions. That decision violates the First and Fourteenth Amendments to the Federal Constitution. Although this is the first time this precise issue is before this Court, the California decision is contrary to the principles of prior decisions of this Court and is in direct conflict with an opinion of the United States Court of Appeals for the Fifth Circuit.

The issue presented by this case is of widespread significance because numerous local governments have enacted similar laws. It is particularly important that this Court undertake full consideration of this appeal because such laws affect and impermissibly restrain the exercise of fundamental constitutional rights of citizens throughout the country.

Section 602 specifically prohibits individuals or associations of persons from contributing more than $250 to a campaign committee for or against a measure on the Berkeley municipal ballot. During the past five years, this

Court has addressed related questions involving the propriety of governmental restrictions on citizens' rights to participate in the political process by making independent monetary expenditures or contributions to campaign committees. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Buckley v. Valeo,* 424 U.S. 1 (1976). Those decisions invalidated restrictions on direct expenditures with respect to either candidate or issue-related elections, but upheld limitations on contributions to candidates and candidate's committees. *Buckley, Bellotti* and earlier decisions of this Court provide considerable guidance and a basis for analysis of the validity of section 602.

1. Section 602 Infringes Upon First Amendment Rights of Speech and Association

First Amendment protection extends to political activity, including the discussion of candidates, ballot measures and issues, the form and operation of government and all matters relating to the political processes. *Mills v. Alabama,* 384 U.S. 214 (1966). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964); *see also Buckley v. Valeo,* 424 U.S. at 14.

It is now a well established constitutional principle that regulation of campaign contributions and expenditures necessarily affects the exercise of the First Amendment right of freedom of speech. To conduct a political campaign requires money to pay for research, media and other organizational and communication expenses.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience

> reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. Valeo, 424 U.S. at 19 (footnote omitted).

The utilization of funds in conducting campaigns or expressing political beliefs is protected by the First Amendment. "[I]t is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' " *First National Bank of Boston v. Bellotti*, 435 U.S. at 786, n. 23 (citations omitted). Campaign contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. at 14.

Section 602's contribution limits also infringe on protected associational freedoms. *Buckley v. Valeo*, 424 U.S. at 22. The right to freedom of association was recognized as a separate and distinct constitutional right in *NAACP v. Alabama*, 357 U.S. 449 (1958). This right has become increasingly important in modern times when in order to have an effective voice, individuals or groups of people frequently find it necessary to join with others to express mutual concerns and to pursue common goals. As stated in *NAACP v. Alabama*, 357 U.S. at 460, "[e]ffective advocacy of both public and private points of view,

particularly controversial ones, is undeniably enhanced by group association. . . ."

A fundamental component of freedom of association is the right to advocate in a group, political and governmental beliefs and ideas. *Healy v. James,* 408 U.S. 169 (1972). This right to join together to advance political causes includes the right to associate in order to assert legal and economic interests. *NAACP v. Button,* 371 U.S. 415 (1963). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1973).

A most important function of a campaign committee such as CARC is to permit persons to associate and pool their resources through monetary contributions. This is particularly significant in a ballot measure campaign, where there is no candidate to speak out and focus attention on the issue and the only voice that can be heard is that of an effective campaign committee. By forcing persons to spend any sums in excess of $250 totally independently of any organized campaign and independently of each other, section 602 restrains those persons from acting in concert to engage in vital campaign activities including the conduct of coordinated research, discussion of campaign strategy, polling of voters, coordination of mailings to voters, purchase of political advertisements and media messages, hiring of skilled campaign management and the solicitation of others to contribute funds.

Section 602 limits associational rights and has the effect of prohibiting those who do not have vast wealth from effectively advocating their views in the only way available, by joining together and pooling their resources. Paradoxically, the limitation has the effect of bestowing political

advantage upon very wealthy persons or corporations or unions who do not need to associate with others to campaign effectively, and who may make unlimited independent expenditures and conduct a campaign by themselves. *See Pacific Gas and Electric v. City of Berkeley,* 60 Cal.App. 3d 123, 131 Cal.Rptr. 350 (1976). Thus, section 602 reduces the political effectiveness of the large majority of individuals and small entities which must aggregate their resources to have their message heard.

2. Section 602 Must Be Viewed With Strict Scrutiny; the Government Has the Burden To Establish Its Validity

Where, as here, an enactment affects fundamental rights of speech and association, the Ordinance is subject to the "closest scrutiny." *Buckley v. Valeo,* 424 U.S. at 25 (quoting *NAACP v. Alabama,* 357 U.S. at 460-61); *accord, First National Bank of Boston v. Bellotti,* 435 U.S. at 786.

Whenever limitations are placed upon First Amendment rights, particularly those involving speech and political association, the government may prevail only upon a convincing demonstration of a compelling governmental interest. *NAACP v. Button,* 371 U.S. at 438-39. Furthermore, "the burden is on the government to show the existence of such an interest." *Elrod v. Burns,* 427 U.S. 347, 362 (1976). "Even then the State must employ means 'closely drawn to avoid unnecessary abridgment . . . .'" *First National Bank of Boston v. Bellotti,* 435 U.S. at 786 (quoting *Buckley v. Valeo,* 424 U.S. at 25).

The City of Berkeley submitted no evidence whatsoever to meet its burden to establish the existence of a compelling governmental interest to support the contribution limit. Nevertheless, the California Supreme Court upheld section 602, relying upon "political scientists" and "commentators" as opposed to anything in the record below.

3. The Opinion of the California Supreme Court Conflicts With Prior Decisions of This Court

The slim majority of the California Supreme Court articulated the following rationale for upholding section 602: "We hold above that large contributons to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; . . ." *Citizens Against Rent Control v. City of Berkeley,* 27 Cal. 3d at 831; *see* Appendix A at 17.

Without any evidence whatever, the Court below theorized that large contributions potentially pervert the referendum process, *Id.* at 826, Appendix A at 9, that the domination of the referendum processes by large contributors leaves other citizens with "stilled voices," *Id.* at 826-27, Appendix A at 9-10, and that large contributors thwart the intended purpose of the referendum when they "use the power of the purse to overcome the power of reason." *Id.* at 827, Appendix A at 10.

In a cogent dissent joined by two other justices below, Justice Frank Richardson stated:

> My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the *compelling* interest found by the majority. It will readily be seen that this wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of 'commentators on our political scene,' 'a political scientist,' or a 'student of the California initiative process.' (*Ante,* p. .... [maj. opn. at 828, Appendix A at 11-13). Moreover, the 'commentators' and 'students' have hardly been unanimous in their support of contribution

> limitations to ballot measures. (For contrary views, see generally, Note, *supra*, 86 Yale L.J. 953; Ely, *The Supreme Court, 1977 Term* (1978) 92 Harv. L.Rev. 5, 163; Redish, *Campaign Spending Laws and the First Amendment* (1971) 46 N.Y.U. L.Rev. 900; Clagett & Bolton, *Buckley v. Valeo* (1976) 29 Vand. L.Rev. 1327.

Id. at 835, Appendix A at 23 (emphasis in original).

The dissent below further stated:

> The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is 'largely a tool of interest groups' would make interesting background material for a political debate. Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented.

Id. at 835, Appendix A at 24 (emphasis in original).

First National Bank of Boston v. Bellotti struck down a Massachusetts law which prohibited corporate contributions and expenditures with respect to issue-related campaigns. In attempting to establish the existence of a compelling state interest to justify those restrictions, Massachusetts asserted as compelling, "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *First National Bank of Boston v. Bellotti,* 435 U.S. at 787. Rejecting this argument, this Court stated:

> Appellee advances a number of arguments in support of his view that these interests are endangered

> by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. *If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.* Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. *Cf. Wood v. Georgia*, 370 U.S. 375, 388 (1962).

Id. at 789-90 (emphasis added, footnote omitted).

The California Supreme Court simply disregarded this central reasoning of *Bellotti* when, despite the lack of any record or legislative findings, it concluded that large contributors "potentially" corrupt or pervert the referendum and initiative processes and that the prevention of such a potential evil was a compelling governmental interest sufficient to uphold section 602. Moreover the Court below did not say that large contributions were in fact "corrupting" the initiative process, or that such corruption was "threatened imminently;" the sole basis for the Court's finding of a compelling interest was the "potential" of corruption at some undefined date in the future.

The majority below further erroneously concluded that candidate and ballot measure elections "differ very little"

and that in both types of elections, large contributors have "equivalent potential to pervert the purpose of the initiative and more generally corrupt the electoral process." 27 Cal. 3d at 826, Appendix A at 9. In so declaring, the majority below ignored another basic premise of *Bellotti:*

> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, e.g., *United States v. Automobile Workers, supra; United States v. CIO, supra,* simply is not present in a popular vote on a public issue.

First National Bank of Boston v. Bellotti, 435 U.S. at 790 (footnote omitted).

Elaborating in a footnote, Justice Powell stated:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . . The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

Id. at 788, n. 26 (citations omitted).

The California Supreme Court opinion also failed to square with vital portions of this Court's decision in *Buckley v. Valeo,* which struck down expenditure limits and upheld limits on contributions to *candidates'* campaigns. In *Buckley,* three governmental interests were advanced by

Mr. Valeo to justify the restrictions: (a) the prevention of corruption and the appearance of corruption created by the real or imagined influence of large contributors on candidates and officeholders; (b) quieting the voice of the affluent in the election process and thereby equalizing the relative ability of all citizens to affect the outcome of elections; and (c) braking the skyrocketing cost of election campaigns and opening the political system to candidates without access to large amounts of money. *Buckley v. Valeo,* 424 U.S. at 25-26. While this Court upheld the limit on contributions to candidates' campaigns, it clearly articulated its reasoning in a way that leaves no doubt that *Buckley* does not apply to contribution limits in issue-related elections:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27 (footnote omitted).

In striking down expenditure limitations, *Buckley* rejected the other interests advanced:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates im-

> posed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan, supra*, at 266, 269, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484.

Id. at 48-49.

> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

Id. at 57 (footnote omitted).

By failing to distinguish between candidate and ballot measure elections, the Court below disregarded a basic premise of *Buckley*. And by postulating that "the domination of these [electoral] processes by large contributors leaves other citizens with a stilled voice . . .," 27 Cal.3d at 826-27, Appendix A at 9-10, the majority below ignored another basic precept of *Bellotti* and *Buckley*, that it is

unconstitutional to restrict the speech of some in order to enhance the relative voice of others.

The decision of the majority of the California Supreme Court also conflicts with the decisions of several of the Circuits. *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974), in addressing the "corruption/appearance of corruption" justification for limits on contributions to ballot measure committees, made these relevant observations:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. *The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.*

Id. at 852-53 (emphasis added, footnote omitted).

In striking down a portion of a Montana statute that prohibited corporate contributions in support of or opposition to ballot issues, the Ninth Circuit, relying on *Bellotti*, stated:

> The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. When corporations seek to influence the electorate and not an individual candidate or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in *Buckley*. That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech.

C & C Plywood Corp. v. Hanson, 583 F.2d 421, 425 (9th Cir. 1978) (citation omitted).

Justice Richardson's dissent below provides an apt summary:

> I wholly disagree with the premise underlying the majority's assumptions which betrays an over-protective 'father knows best' syndrome. I find nothing in either Constitution, federal or state, or in law or policy which permits a city council to quantify or measure out the amount of information or misinformation which the electorate may receive in a ballot measure campaign. . . .
>
> The long arm of government does not belong in this arena where the direct voice of the people is heard through the initiative or referendum. Where the clash of contesting ideas, opinions and arguments in many forms culminates in the ultimate expression of the people's will, through an issues election, let the people be the sole judge. Let them separate for themselves the wheat of truth from the chaff of falsehood. They need no self-appointed protective guardian to measure for them the amount of public issue information, misinformation or argument which is to be available for their consideration. Justice Jackson put it very well in his concurring opinion in *Thomas v. Collins* (1945) 323 U.S. 516, 545: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

27 Cal.3d at 838-839, Appendix A at 28-29.

4. The August 7, 1980, California Supreme Court Decision Directly Conflicts With A Unanimous Decision of the United States Court of Appeals For the Fifth Circuit, Filed July 11, 1980

In its opinion in the consolidated action, *Let's Help Florida v. McCrary*, 621 F.2d 195 (1980),[5] the Fifth Circuit framed the issue thusly: "In these consolidated cases we must decide whether Florida statutes that restrict the size of contributions to a single political committee in a referendum election violate the first amendment rights of persons who want to contribute more than the maximum amount allowed by the statutes." *Id.* at 197, Appendix H at 90. The Florida statute in question limited contributions to committees for or against issues on the state ballot to $3,000, and to committees for or against issues on county ballots to $1,000. The Fifth Circuit unanimously held that the contribution limits were unconstitutional restrictions on First Amendment rights of speech and association, and were not justified by any compelling state interest.

> The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers —in this case, the voters themselves—except in a

[5]For convenience, the Fifth Circuit's Opinion appears as Appendix H.

> manner protected by the first amendment. * * * With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Let's Help Florida v. McCrary, 621 F.2d at 199-200, Appendix H at 96-98.

There is a direct and irresolvable conflict between the decisions, filed less than thirty (30) days apart, of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In response to the 1972 election and the ensuing Watergate controversy, a multitude of laws were enacted at federal, state and local levels to regulate the electoral processes. Unfortunately, the rush to legislate was not always accompanied with due regard for the protection of the fundamental rights of speech and association. *Buckley* and its progeny were the result. Perhaps the most significant remaining issue to be resolved is the one presented by this appeal: the validity of limits on the amount of money a person or group can contribute to a ballot measure or issue-related campaign committee. There is little doubt that such contribution limits strike to the heart of First Amendment rights of all those affected.

Contribution limits have been enacted not only in the City of Berkeley and the State of Florida, but also in the following California cities and/or counties: City of Cypress ($100 per ballot measure); City of Del Mar ($20 per ballot measure); City of Fremont ($250 per ballot measure); City of Newport Beach ($200 per ballot measure); City of San Diego ($250 per ballot measure); San Diego

County ($250 per ballot measure); City and County of San Francisco ($500 per ballot measure); City of San Juan Capistrano ($100 per ballot measure); Santa Cruz County ($500 per ballot measure); and the City of Santa Monica ($.02 times the voting age population per measure). Currently a bill is pending in the California Legislature to enact similar contribution limits with respect to statewide elections.

Given the widespread presence of legislation limiting contributions to ballot measure campaigns, their impact on the exercise of fundamental rights, and the diametrically opposed decisions of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit, the issues presented are substantial and merit this Court's plenary review and adjudication.

CONCLUSION

For the foregoing reasons, it is requested that probable jurisdiction be noted.

Respectfully submitted,

VIGO G. NIELSEN, JR.
COUNSEL OF RECORD
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Attorneys for Appellants

No. 80-737

Supreme Court, U. S.
FILED
NOV 5 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of the State of California

APPENDIX TO JURISDICTIONAL STATEMENT

VIGO G. NIELSEN, JR.
COUNSEL OF RECORD
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, CA 94111
Telephone: (415) 362-1940
Attorneys for Appellants

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7682

Appendix A

In The Supreme Court of the State of California

S.F. 24124
Super. Ct. No. 493837-0

Citizens Against Rent Control et al.,
Plaintiffs and Respondents,

vs.

City of Berkeley et al.,
Defendants and Appellants.

[Filed Aug. 7, 1980]

OPINION

May a municipality constitutionally place a limit on the size of contributions to committees formed to support or oppose ballot measures? We conclude that while the challenged legislation must be examined with great care, such a limit is constitutional because it serves compelling governmental interests without unduly infringing upon First Amendment rights. Although resolution of a conflict between fundamental interests such as these is never easy, in this instance the balance favors allowing government regulation.

At the April 1977 Berkeley municipal election the electorate was asked to vote on a proposed initiative charter amendment to create a rent control board empowered

SEE DISSENTING OPINION

to fix the rates for most rental units in the city. The measure was controversial, and opponents formed an unincorporated association known as Citizens Against Rent Control (CARC).

Berkeley's Election Reform Act of 1974 (Ord. No. 4700-N.S.) regulates its municipal elections. The city attorney and the Berkeley Fair Campaign Practices Commission informed CARC that section 602 of the act, prescribing a $250 maximum on contributions in support of or in opposition to a ballot measure, would be enforced in the forthcoming election.[1] CARC admittedly accepted several contributions in excess of the $250 limit, totalling some $18,600. On March 30, 1977, the Fair Campaign Practices Commission ordered CARC to pay that amount to the city's general fund as required by section 604 of the act.[2] CARC

---

[1]Section 602 is authorized by Elections Code section 22808 and provides: "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."

"Person" is given a broad definition in section 219 to include all types of business entities as well as individuals.

"Contribution" is broadly defined in section 206 to include all types of monetary donations or loans that are directly or indirectly in aid of or in opposition to a ballot measure.

Section 600, limiting candidate contributions to $250, is not here in issue.

[2]Section 604 provides: "If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General Fund of the City."

responded by filing a complaint for injunctive and declaratory relief against the city and the commission (hereinafter Berkeley), contending that section 602 was in violation of its First Amendment rights and those of other named plaintiffs who desired to make contributions larger than $250.[3] The superior court granted a preliminary injunction against enforcement of sections 602 and 604.

After the election, CARC amended its complaint to allege it had accumulated a campaign debt of approximately $8,000 and it sought to solicit large contributions to satisfy this debt. CARC then moved for summary judgment on the ground that section 602 was invalid on its face. The court granted the motion and rendered a judgment declaring that section 602 violated the First Amendment to the United States Constitution and article I, section 2, of the California Constitution. Berkeley appeals.

I

Our past decisions, and those of the United States Supreme Court, establish a framework for determining whether section 602 prevents effective political advocacy or impermissibly interferes with associational rights. The seminal ruling is Buckley v. Valeo (1976) 424 U.S. 1, which considered the constitutionality of the Federal Election Campaign Act of 1971 (Pub.L.No. 92-225, 86 Stat. 3) and the Federal Election Campaign Act Amendments of 1974 (Pub.L.No. 93-443, 88 Stat. 1263). *Buckley* upheld against First Amendment attack the act's limitation of $1,000 on

[3]The other plaintiffs were a real estate broker, the Berkeley Board of Realtors, and three individuals who alleged they were contributors to CARC and owners of real property in Berkeley.

contributions to candidates for federal office, but invalidated restrictions on *expenditures* by or on behalf of candidates. The court held that the contribution and expenditures of money for political expression were the equivalent of pure speech, and hence that statutory limits thereon must be judged by the strict scrutiny reserved for infringement of First Amendment rights. (*Id.* at pp. 15-19, 58-59.) We adhered to *Buckley* in Citizens for Jobs & Energy v. Fair Political Practices Com. (1976) 16 Cal.3d 671 (invalidating expenditure limitations on campaigns to pass ballot propositions), and in Hardie v. Eu (1976) 18 Cal.3d 371 (invalidating expenditure limitations on campaigns to qualify ballot propositions). We observed in *Hardie* (at p. 378), "On the other hand, as the high court noted in *Buckley,* appropriate limitations on individual *contributions* remain a constitutionally valid means of dealing with undue influence by moneyed interests in the electoral process. (*Buckley, supra,* at pp. 23-28 . . . .)"

While this case was on appeal, the Supreme Court spoke to a related issue in First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, overturning a Massachusetts statute insofar as it prohibited corporations from making *any* expenditure or contribution, directly or indirectly, to influence the vote on ballot measures. The court held that the statute infringed upon First Amendment rights (*id.* at pp. 785-786), and looked to whether it served a compelling state interest by the least restrictive means (*id.* at p. 786). The court recognized the importance of the state's asserted justification of "Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a

democracy for the wise conduct of government'" (*id.* at pp. 788-789), but declined to find the Massachusetts statute served such an interest in the absence of a showing by record evidence or legislative findings that "the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government." (Fn. omitted; *id.* at pp. 789-790.) The court rejected the view that the possible influence of corporate advertising on the outcome of the vote justified the complete prohibition of such advertising. (*Id.* at pp. 790-792; see generally Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns* (1978) 13 U.S.F. L.Rev. 145 (hereinafter U.S.F. Comment).)

II

Berkeley's first contention is that CARC and the other plaintiffs have failed to show infringement of their First Amendment rights so as to require it to demonstrate that section 602 serves a compelling governmental interest by the least restrictive means. CARC responds that certain affidavits before the trial court furnished adequate evidence both that its ability to engage in effective political advocacy was impaired and the associational rights of its contributors were significantly diminished. Regardless of the weight of that evidence, however, the controlling federal decisions appear to hold that monetary restrictions on election campaigns will be deemed to require strict scrutiny. Thus in *Buckley* the court differentiated contribution from expenditure limitations, stating that the for-

mer resulted in "only a marginal restriction" and "little direct restrain" on political communication. (424 U.S. at pp. 20-21.) However, despite the finding of marginal effect the court invoked strict scrutiny in considering the constitutionality of the contribution limitations. (*Id.* at pp. 23-38.) We likewise give the challenged ordinance stringent review.

III

The ordinance at issue here affects one of the prominent attributes of the 20th-century California political landscape: the popular initiative and referendum. We reiterated only recently that " 'The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." [Citations.]' " (Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 41.) The United States Supreme Court recognized our commitment

to the initiative and referendum when it declared, "California's entire history demonstrates the repeated use of the referendums to give citizens a voice on questions of public policy. . . . Provisions for referendums demonstrate devotion to democracy, . . ." (James v. Valtierra (1971) 402 U.S. 137, 141.)

There can be no doubt that government regulation designed to preserve the integrity of the initiative and referendum promotes a goal of the highest priority. As will appear, the Berkeley ordinance serves this compelling interest in a manner that does not frustrate another important aim of the electoral process: i.e., that all be given an opportunity to be heard so as to assure the widest dissemination of opinions on important public questions.

A

While the provision of the 1911 amendment for statewide initiatives and referenda has drawn most of the public and judicial attention over the years, that amendment also declared, "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law."[4] The Legislature has fully implemented these pro-

---

[4]Former California Constitution, article IV, section 1, paragraph 18. Present article II, section 11, similarly declares, "Initiative and referendum powers may be exercised by the electors of each city or county under procedures that the Legislature shall provide. This section does not affect a city having a charter."

The former section also contained a reference to charter cities similar to that in the present Constitution. However, we interpreted this language to merely give charter cities, like Berkeley, the au-

visions by statutes regulating county, municipal, and district initiative and referendum elections. (Elec. Code, § 3700 et seq.)

The reason for the adoption of the initiative and referendum methods of direct legislation by the people is beyond any doubt: the electorate sought access to and control of a legislative process that it believed could be dominated by special interests. (See Diamond, *California's Political Reform Act: Greater Access to the Initiative Process* (1975) 7 Sw.U.L.Rev. 453, 455-463; U.S.F. Comment, p. 164; Note, *The California Initiative Process: A Suggestion for Reform* (1975) 48 So.Cal.L.Rev. 922, 923-924.) The initiative and referendum gave the electorate an opportunity to exercise the power of direct as distinguished from representative democracy, and it has made frequent use of that power. The ensuing greater popular participation in public affairs has been generally acknowledged as salutary.

It has also been recognized, however, that the initiative and referendum processes can themselves be employed by the special interest groups whose power they were designd to curb. (Diamond, *op. cit. supra,* 7 Sw.U.L.Rev. at pp. 461-463.) Accordingly, the voters used the initiative to regulate those same processes, and to enact other election re-

---

thority to increase the powers of referendum and initiative granted by the Constitution, but not to diminish them. (Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 610-611; accord, Crestview Cemetery Assn. v. Dieden (1960) 54 Cal.2d 744, 756; Brown v. Boyd (1939) 33 Cal. App. 2d 416, 420-422; Comment, *The Scope of the Initiative and Referendum in California* (1966) 54 Cal.L. Rev. 1717, 1723, fn. 40.)

forms, by adopting the Political Reform Act of 1974. (Gov. Code, § 81000 et seq.) Later that year, the Legislature enacted sections 22004 and 22808 of the Elections Code, which allow counties and cities to impose limits on contributions to local ballot measure campaigns. As noted above, such restrictions were said to be constitutional in Hardie v. Eu.

While admitting that contribution limitations in candidate elections serve a compelling interest of preventing corruption (Buckley v. Valeo, *supra*), CARC argues that the subsequent decision in *Bellotti* demonstrates that no comparable danger of corruption exists in a ballot measure campaign. As shown below, we conclude that *Bellotti* is distinguishable from the present case and that to allow large contributions to ballot measure campaigns has an equivalent potential to pervert the purpose of the initiative and more generally corrupt the electoral process.

Concededly, initiative and referendum elections do not raise all the same problems as candidate elections, in which large campaign contributions risk creating future "political debts." (*Bellotti*, 435 U.S. at p. 788, fn. 26.) However, the initiative and referendum procedure is nonetheless subject to being perverted by large contributions. Indeed, in their effect upon the *election process*, contributions to candidates and contributions for or against propositions differ very little.

The original proponents of the initiative and referendum sought to give the electorate the ability to govern directly by majority rule: this was to be true democracy as distinguished from representative democracy. Instead, the

domination of these processes by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will.[8] The finding, all too common in commentaries on the initiative and referendum, that direct legislation is "enormously expensive to produce and is largely a tool of interest groups," appears to have inspired measures like the Berkeley ordinance, which attempt a return to the primary goals of the initiative and referendum. (Crouch et al., Cal. Government and Politics (3d ed. 1964) p. 108.) When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests. (Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 Wis.L.Rev. 323, 330.)

The danger lies not only in the frustration of our declared policy of preserving the initiative and referendum system, but in the inevitable effect on the electoral process as a whole. The importance of this process to the conduct and future of our democratic form of government cannot be gainsaid. Indeed, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." (Reynolds v. Sims

---

[8]Thus the Berkeley Election Reform Act begins with the declaration that "Local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth . . . ."

(1964, 377 U.S. 533, 555.) "The electoral process is at the very heart of constitutional government; it is to a large degree the ultimate arena in the competitive struggle for ideas." (Rosenthal, *Campaign Financing and the Constitution* (1972) 9 Harv.J.Legis. 359.) And, as the United States Supreme Court said on a closely related matter, "what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society." (United States v. Auto Workers (1957) 352 U.S. 567, 570.)

In *Buckley* the court recognized the potential for corruption of the electoral process in a regime of large contributions in candidate elections. (424 U.S. at pp. 26-27.) Here, it is argued that the electoral process is similarly corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference. In another context we recognized the danger of such a loss of confidence: "One disturbing phenomenon of the current political scene of which we may take judicial notice is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern, and lack of participation, if prolonged, may pose a danger to the democratic institutions, far more subtle and invidious than any other." (Johnson v. Hamilton (1975) 15 Cal. 3d 461, 471.)

Commentators on our political scene have recognized the nexus between voter apathy and large campaign con-

tributions. "The mass of citizens have tended to shun the opportunity to donate to campaign coffers and to participate in other forms of political activity because they felt their limited resources would be outmatched by a small group of rich and influential 'angels'. . . . [This feeling] has also inspired the emergence of a growing sense of estrangement or disaffection from public institutions and leaders." (Berg et al., Corruption in the American Political System (1976) 47-50.) The result of this phenomenon is decidedly negative: "By abandoning the field of battle, the average voter leaves the political wars to be fought by big contributors and powerful interests." (*Id.* at p. 51.)

Another political scientist reviewed the dramatic effect of large contributions on the results of ballot measure votes in Colorado and concluded, "This study did not find Colorado citizens apathetic, cynical, or ignorant towards the initiatives. The majority of people were interested in the issues and did have ideas on them. But on several proposals their ideas tended to reflect the latest polling techniques, campaign strategies and gimmicks of those with the most power and money. The corrosive impact of this unregulated, grossly unequal power perverted the democratic process in a manner for all to see, whether or not the final election results were to one's liking. . . . It seems clear that initiative campaigns can be subject to the same types of influence that exist in other types of electoral politics, although perhaps in different proportions. Because personality issues may be less important, and partisanship is less clear, money may be all the more crucial." (Shockley, The Initiative, Democracy and Money: The Case of Colorado, 1976, printed in Hearings Before

the Subcom. on the Const. of Sen. Com. on Judiciary on S.J. Res. 67, 95th Cong., 1st Sess., at pp. 188-189 (1977).) A student of the California initiative process has also expressed his belief that this form of corruption may be as injurious as a direct bribe of a public official. (Radabaugh, Tendencies of Cal. Direct Legislation (1961), *id.* at p. 279.)

The Berkeley ordinance, on the other hand, seeks to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote and their participation, whether in the form of money or services, are significant. We conclude that the interests served by the ordinance should be recognized as compelling. Next, we turn to an examination of the countervailing First Amendment rights asserted by CARC.

B

CARC contends that any interest served by section 602 pales in comparison with the infringement of First Amendment rights caused by the ordinance. It further argues, relying on *Bellotti,* that the ordinance actually has a detrimental effect on the initiative process because it prevents the voters from receiving adequate information to enable them to cast an informed vote. We agree, of course, that direct participation of the people through the initiative or referendum "increases the need for ' "the widest possible dissemination of information from diverse and antagonistic sources." ' [Citation.]" (*Bellotti,* 435 U.S. at p. 790, fn. 29); but while the measure at issue in *Bellotti* completely silenced the voice of Massachusetts corporations, the ordinance here has no such purpose or effect.

To the contrary, the Berkeley ordinance allows to all the right to participate in a ballot measure campaign and to join with others in so doing. The statute at issue in *Bellotti* totally prohibited both corporate expenditures and contributions; the Berkeley ordinance places no limit on expenditures, and permits contributions from any source in amounts up to $250. Thus, an individual or business entity that believes its interests are benefited or threatened by a proposed ballot measure remains free to *spend* money in unlimited amounts, by mass advertising or any other method, to inform the public of its reasons why the measure should be adopted or defeated. However, in order to maintain the initiative and referendum processes as a tool of direct democracy for the people, individuals or business entities are prohibited from *contributing* more than a modest sum to a committee formed to support or oppose the measure. In addition, of course, no restriction is placed on the right of individuals or corporate members to volunteer their *services* in a ballot measure campaign.

CARC's assertion that its right to engage in effective political advocacy is affected by a contribution ceiling is answered by the decision in *Buckley*. The high court recognized the constitutional problems that would result if a contribution limit did prevent effective advocacy, but stated: "The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to pro-

mote political expression." (424 U.S. at pp. 21-22.) The court pointed out that only 5.1 percent of the funds raised by 1974 congressional candidates came in amounts greater than the $1,000 ceiling. (*Id.* at p. 21, fn. 23.) Here, Berkeley stresses that only about 17 percent of CARC's funds were raised from persons or entities contributing in excess of the limitation. Further, CARC ended all fundraising almost a month before the election, and presumably could have raised more funds in legal amounts had it continued to solicit contributions.

We conclude that the Berkeley ordinance does not interfere with effective advocacy or dissemination of information by all sides to a ballot measure controversy, but instead is designed to preserve initiative and referendum elections for the salutary purpose for which they were created, and tends to prevent the corruption of the political process that otherwise results.

Similarly, the ordinance does not impermissibly limit associational rights guaranteed by the First Amendment. CARC argues that such rights are violated because those who desire to give more than $250 are required to spend it on their own. This argument too was answered in *Buckley*, when the court observed that contribution ceilings nevertheless leave the contributor "free to become a member of any political association and to assist personally in the association's efforts . . . ." (424 U.S. at p. 22.) Thus under the Berkeley ordinance anyone who wishes to do so may join and work for any committee supporting or opposing a ballot measure. This is the heart of the freedom to associate; no case has held that the right extends so far

as to entitle political contributors to dominate such committees and their campaigns by unconstrained financial pressure.

It could be contended that unlimited expenditures by individuals and corporations can be as sinister as unlimited contributions to committees, and that the activities of committees can be as essential to the political process as those of individuals and corporations. While as a broad proposition that viewpoint may be arguable, it is a value judgment. On such matters we yield to the legislative determination.

The contrary legislative determination here is not without a tenable rationale. Campaign committees are generally shrouded in anonymity, often adopting seductive names promising to save taxes, preserve resources, or prevent crime. While committees must ultimately identify their donors, the campaign propaganda and the identification are not simultaneous: inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed. On the other hand, when political views are expressed directly by individuals and corporations rather than indirectly or covertly through committees, the voters are immediately made aware of the interested parties and can evaluate their motivation.

C

Finally, the ordinance cannot be sustained unless it is necessary to promote a compelling governmental interest and operates by means that are the least restrictive of

First Amendment rights. We hold above that large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; in light of this conclusion, restricting the size of such contributions "focuses precisely on the problem." (*Buckley*, 424 U.S. at p. 28.) We reject, as the *Buckley* court did, the argument that mere disclosure of contributions is sufficient for this purpose. (*Id.* at pp. 27-28.) As with the measure at issue in *Buckley*, the contribution limitation in section 602 does not interfere with other ways of engaging in political activity, but restricts the one means that represents a danger rather than an aid to the electoral process.

We also reject the argument that the ordinance is unduly restrictive because the $250 ceiling is too low. The major proportion of CARC's funds came in amounts under the ceiling; moreover, the few contributions that were larger were considerably above the ceiling, and hence would not have been aided by a modest upward adjustment.[6] The court in *Buckley* refused to invalidate contribution ceilings on this ground absent proof that the difference was so great as to be a matter of kind and not of degree. (424 U.S. at p. 30.) No such proof is presented here. Finally, we point out this is not a statewide initiative but merely a local campaign in a single municipality, and the amount of ceiling must be viewed in that light.

---

[6]The record shows that CARC received three contributions of $5,000, one of $2,000, and two of $1,000.

We conclude that the Berkeley ordinance is necessary to the accomplishment of compelling governmental interests, and uses the least restrictive means to achieve those ends. It violates neither the First Amendment nor article I, section 2, of the California Constitution.

The judgment is reversed.

Mosk, J.

We concur:
Bird, C.J.
Tobriner, J.
Newman, J.

Dissenting opinion by Richardson, J.

I respectfully dissent. In my view, the Berkeley ordinance impermissibly suppresses rights of free expression of California citizens. It clearly violates First Amendment principles, both of freedom of speech and association, as repeatedly expressed by the United States Supreme Court. It also contravenes similar guarantees contained in article I, section 2, of the California Constitution.

Provisions of the ordinance have been litigated before. Its section prohibiting any person from making "any contribution to any candidate or committee" was struck down in Pacific Gas & Electric Co. v. City of Berkeley (1976) 60 Cal.App.3d 123. The provision before us prohibits any individual, corporation, or other entity from contributing more than $250 to any campaign in support of, or opposition to, any ballot measure. A citizens' committee organized itself to oppose a rent control ballot measure at the Berkeley general election of April 1977. The committee raised money from interested citizens and groups to assist its campaign, and the majority now authorizes the forfeiture into the Berkeley City Treasury of $18,600 of the committee's donated funds.

The ordinance impairs two constitutional rights of the donors and contributors to the committee. Each is fundamental. Each is constitutionally protected. First, is the citizen's right of free speech and of unrestricted expression. The First Amendment prohibits Congress from "abridging the freedom of speech." A similar guarantee, expressed somewhat differently, appears in article I, section 2, of our state Constitution, and provides that "Every

person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

With specific application to the free speech limitations contained in the ordinance before us, it has been held by the highest authority that campaign restrictions "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [Citation.] Although First Amendment protections are not confined to 'the exposition of ideas,' [citation] 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . .' [Citation.] This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' [citation]." (Buckley v. Valeo (1976) 424 U.S. 1, 14.)

The second right, which is restricted by the Berkeley law, is that of free association. As we observed last year "contribution limitations restrict the contributor's freedom of association, . . ." (Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 43.) This associational right has also been repeatedly described by the United

States Supreme Court as a "'basic constitutional freedom,' Kusper v. Pontikes [1973] 414 U.S., at 57, that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" (Buckley v. Valeo, supra, 424 U.S. 1, 25; Shelton v. Tucker (1960) 364 U.S. 479, 486; Bates v. Little Rock (1960) 361 U.S. 516, 522-523.)

The reality of this limitation on a donor's associational rights is immediately disclosed when it is noted that the Berkeley ordinance permits expenditures without limit to influence the results of the election by advertising or other means. John Q. Citizen himself may spend unlimited funds for or against the rent control measure. Yet, if the same citizen exercising a right to associate with others of like mind seeks to give to a comittee which either supports or opposes the same ballot proposition, the *contribution* may not exceed $250. Although the majority approves this result, Justice Rouse speaking for a unanimous Court of Appeal was eminently correct in describing this consequence as "a supreme anomaly" because thereby "a contributor is entitled to less protection when he exercises his First Amendment rights of free speech *and association,* than if he exercised only his right to free speech." One fundamental right receives greater protection than two in combination. Such a result is wholly untenable and cannot be valid constitutional law. "If a person's independent speech cannot be restricted constitutionally, neither can his speech through association." (Note, *The Unconstitutionality of Limitations on Contributions to Political Committees in the 1976 Federal Election Campaign Act Amendments* (1977) 86 Yale L.J. 953, 967.)

When two such fundamental rights of a citizen, free speech and association, are conjoined, any attempted restriction "is subject to the closest scrutiny." (*Buckley*, at p. 25.) We have said that any impairment may be supported only when "the restraints imposed are nonetheless justified as incidental to the promotion of a 'substantial' or 'compelling' governmental interest, unrelated to speech, and unattainable by means less intrusive upon First Amendment rights." (Hardie v. Eu (1976) 18 Cal.3d 371, 377.) In so concluding we have but echoed similar expressions by the high court: Buckley v. Valeo, supra, 424 U.S. 1, 14, 21; N.A.A.C.P. v. Button (1963) 371 U.S. 415, 438.)

More recently, in a case in which the Supreme Court invalidated an outright ban on expenditures or contributions by corporations aimed at influencing the vote on ballot measures, the court emphasized that when restraints on First Amendment rights are at issue " 'The state may prevail only upon showing a subordinating *interest which is compelling*' [citations], 'and the burden is on the government to show the existence of such an interest.' [Citation.] Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment. . . .' [Citations.]" (Italics added, First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, 786.)

What, then, is the compelling interest requiring imposition of a restraint so substantial on two rights so fundamental? The majority identifies it thus: "large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; . . ." (*Ante*, p. ..... [maj. opn., at p.

18].) My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the *compelling* interest found by the majority. It will readily be seen that this wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of "commentators on our political scene," "a political scientist," or a "student of the California initiative process." (*Ante*, p. ..... [maj. opn., at pp. 12-14].) Moreover, the "commentators" and "students" have hardly been unanimous in their support of contribution limitations to ballot measures. (For contrary views, see generally, Note, supra, 86 Yale L.J. 953; Ely, *The Supreme Court, 1977 Term* (1978) 92 Harv. L. Rev. 5, 163; Redish, *Campaign Spending Laws and the First Amendment* (1971) 46 N.Y.U. L.Rev. 900; Clagett & Bolton, *Buckley v. Valeo* (1976) 29 Vand. L.Rev. 1327.)

The majority's conclusion that there is such a "threat" to our electoral system thereby "potentially" inhibiting the initiative process may or may not be correct. There is no record before us and in this connection the procedural posture of the case should be noted. The trial court granted summary judgment in favor of the citizens' committee which attacked the ordinance. Assuming, only for purposes of analysis, that the trial court was improvident in the entry of its summary judgment invalidating the ordinance, it is manifestly unfair for the majority on the other hand to sustain the ordinance without affording the citizens' committee an opportunity to challenge or rebut the opinions

and views of the "commentator," "political scientist," and "student" on which the majority wholly relies. The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is "largely a tool of interest groups" would make interesting background material for a political debate. Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented. Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what that arithmetic proves.

The rationale for the ordinance's restrictions, viewed as sufficient by the majority, is the danger of "corruption" of the initiative process through the infusion of unlimited sums of money by "large contributors" (*ante*, p. .... [maj. opn., at p. 11]) favoring or opposing a ballot measure. This, the majority argues, will destroy the electorate's "confidence in our political system." (*ante*, p. .... [maj. opn., at p. 14].) In the absence, however, of some affirmative showing "by record or legislative finding" this precise reasoning, central to the majority opinion, was flatly rejected, as to corporate contributors, by the *Bellotti* court, supra, 435 U.S. 765, at pages 789-790, in these words: "[T]here

has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government." (Pp. 789-790.) Similarly, there has been "no showing" whatever that large contributors, corporate or otherwise, have thwarted or perverted the initiative in California, which at present appears to be alive and well and increasingly used.

The majority further concludes that candidate and ballot measure elections "differ very little" and that, as in candidate elections, large contributions have "equivalent potential to pervert the purpose of the initiative and more generally corrupt the electoral process." (*Ante*, p. .... [maj. opn., at p. 10].) But again, the Supreme Court summarily dismissed this reasoning, noting, "*Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections,* [citation] *simply is not present in a popular vote on a public issue.* To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' [citation.]" (*Bellotti*, supra at p. 790.) (Italics added.)

The same result was reached July 11, 1980, by a unanimous Fifth Circuit in which it sustained a district court's invalidation of similar statutory limit on contributions to a committee supporting a referendum measure. The Court

of Appeals noted: "When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment." (Let's Help Florida v. McCrary (5th Cir. 1980) .... F. 2d .... (Nos. 78-2497, 79-2091).) For identical views from the Second Circuit, see Schwartz v. Romnes (1974) 495 F.2d 844, 851-853, and from the Ninth Circuit see C & C Plywood Corp. v. Hanson (1978) 583 F.2d 421, 425.

Directly answering and rejecting the majority's assertion that, unless restricted, "the . . . by large contributors leaves other citizens with a stilled voice, . . ." (*ante*, p. .... [maj. opn., at p. 10]) the high tribunal emphasized, ". . . *the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment*, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources," ' and ' "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ' New York Times Co. v. Sullivan [(1964) 376 U.S. 254] at 266, 269, quoting Associated Press v. United States, 326 U. S. 1, 20 (1945), and Roth v. United States [1957] 354 U. S., at 484. The First Amendment's protection against governmental abridgment of free ex-

pression cannot properly be made to depend on a person's financial ability to engage in public discussion. [Citation.]" (Buckley v. Valeo, supra, 424 U.S. 1, 48-49, italics added.)

Thus, point by point, I find the majority's rationale wholly inconsistent with and opposed to the First Amendment free speech and associational pronouncements of the United States Supreme Court, which are binding upon us under federal supremacy principles.

Moreover, the majority does not attempt to answer Justice Rouse's perceptive analysis of the meaning of "corruption" within the initiative context: "The term 'corrupt' implies the existence or expectation of a political quid pro quo. In addition, the term 'corruption' subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system, objective truth is that which the majority subjectively chooses to adopt. Hence it is delusive to maintain that a declaration by the electorate can be 'corrupt.' The price of free speech is that we must put up with opinions which we may deem to be the purest humbug, untainted by any trace of truth . . . . (N.A.A.C.P. v. Button [1963] 371 U.S. 415, 445.)"

Beyond this, however, there is inherent in the majority position an underlying theme that to me is disturbing, namely, that somehow the California electorate needs to be "protected" from free spending "special interests" which will mislead the voters at election time with slanted propaganda, confusing them into making decisions that are unwise for them. This whole approach is very dubious for several reasons.

I note that section 112 of the Berkeley ordinance requires that the city shall publish in Berkeley newspapers, and in such other newspapers as the Berkeley Fair Campaign Practices Commission considers appropriate, a list of all contributors of over $50 to all candidates or committees. These publications shall occur at least twice during the last seven days of the campaign. The sources of initiative financing thus are matters of public record freely available to the electorate before an issues election. (See *C & C Plywood Corp.*, supra, at p. 425.)

The majority, in my opinion, substantially underestimates the sophistication, intelligence and political maturity of the California electorate. It is a reasonable assumption that the average voter understands that the initiatives and referenda, statewide or local, are sponsored and supported by groups or individuals who may have "axes to grind" and who are beneficially interested in the result.

The increasing use of the initiative and referendum and the rising costs of elections, as noted by Justice Rouse, are hard facts of the present political scene. Doubtless $250 does not buy as much free speech today as it did in 1974 when the ordinance was adopted, suggesting the not altogether pleasing prospect that under the majority's rationale a citizen's most fundamental First Amendment rights may expand and contract with the Consumer Price Index.

Regardless of the foregoing, however, I wholly disagree with the premise underlying the majority's assumptions which betrays an over-protective "father knows best" syndrome. I find nothing in either Constitution, federal or

state, or in law or policy which permits a city council to quantify or measure out the amount of information or misinformation which the electorate may receive in a ballot measure campaign. In my view, a city council has no authority to permit $250 worth of free speech and association and then, drawing the line, to confiscate for the city treasury all sums in excess thereof donated either by supporters or opponents who wish to be heard on an initiative measure.

The long arm of government does not belong in this arena where the direct voice of the people is heard through the initiative or referendum. Where the clash of contesting ideas, opinions and arguments in many forms culminates in the ultimate expression of the people's will, through an issues election, let the people be the sole judge. Let them separate for themselves the wheat of truth from the chaff of falsehood. They need no self-appointed protective guardian to measure for them the amount of public issue information, misinformation or argument which is to be available for their consideration. Justice Jackson put it very well in his concurring opinion in Thomas v. Collins (1945) 323 U.S. 516, 545: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

The controlling principle is fundamental: "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves. See

Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Meiklejohn, The First Amendment is an Absolute, 1961 S. Ct. Rev. 245, 263. The First Amendment rejects the 'highly paternalistic' approach of statutes like § 8 which restrict *what* the people may hear. [Citations.]" (*Bellotti*, supra, fn. 31, pp. 791-792, italics added.) In similar fashion, in my view, the First Amendment prohibits adoption of ordinances which restrict *how much* the people may hear on public issues. This is the clear import of the recent First Amendment expressions of the high court. In the words of one interpretive commentator: "The court [in *Bellotti*] properly deemed it safer to entrust the marketplace of ideas to private and diverse individuals and groups than to allow state controls over speakers and messages. The Court's approach is consistent with recent decisions invalidating paternalistic state restrictions on commercial speech. The public can be trusted to evaluate political and commercial messages in light of their sources before making political and consumer decisions." (Ely, supra, 92 Harv. L.Rev. at pp. 168-169.)

There can be no doubt that a rent control measure is a "governmental affair" of broad interest to landlords, tenants and to the public at large. A free flow of information to an electorate which decides this issue is wholly salutary. Public comment and discussion, pro or con, is highly desirable and should be encouraged. Thus, the speech is protected.

Finding it impossible to square either the majority's rationale or its holding with numerous United States Supreme Court decisions, several of them very recent,

which define in broad terms the reach of the First Amendment protections for American citizens, I conclude that the ordinance before us is constitutionally flawed.

Doubtless, the Berkeley City Council in adopting the contribution restrictions of the ordinance was well intentioned. Nonetheless, it was misadvised for it violated the First Amendment in trenching on two fundamental rights of our citizens without any demonstration of the requisite degree of compelling interest. The limitations of the ordinance cannot stand when considered in the light of this overriding pronouncement of the United States Supreme Court in *Bellotti*, supra, at pages 791-792: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the framers of the First Amendment." [Fn. omitted.]

I would affirm the judgment.

Richardson, J.

We concur:
Clark, J.
Manuel, J.

Appendix B

In the Court of Appeal of the State of California

First Appellate District

Division Two

1 Civ. 43451
(Super. Ct. No. 493837-0)

Citizens Against Rent Control/Coalition for Fair Housing, et al.,
Plaintiffs and Respondents,

vs.

City of Berkeley, et al.,
Defendants and Appellants.

[Filed Dec. 13, 1979]

Defendants appeal from a summary judgment declaring that section 602 of the Berkeley Election Reform Act of 1974 (Ordinance No. 4700-N.S.) is unconstitutional. That section provides that "no person[1] shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."

[1]Section 219 of the act defines "persons" as "an individual proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert."

Plaintiffs in this action are a political committee known as the Citizens Against Rent Control/Coalition for Fair Housing (hereafter CARC) and various contributors thereto. The defendants are the City of Berkeley, the Berkeley City Council, the Berkeley Fair Campaign Practices Commission and the individual members of that commission. Plaintiffs' complaint alleged that they were opposed to Proposition "B," a measure which would impose a system of rent controls in the City of Berkeley and which was on the ballot for a general election to be held on April 19, 1977. It was further alleged that a controversy between the parties had arisen, in that defendants took the position that CARC was prohibited from accepting more than $250 from any single person or entity, whereas plaintiffs were of the opinion that any such restriction would be invalid as an unconstitutional infringement upon plaintiffs' rights of free speech and freedom of association. Plaintiffs sought injunctive relief and a judicial declaration that section 602 of the Berkeley Election Reform Act of 1974 was unconstitutional and void.

Following the issuance of a temporary restraining order and an order to show cause, defendants answered, denying that the ordinance under attack was invalid.

Thereafter, plaintiffs moved for summary judgment, requesting that the court rule that section 602 was unconstitutional on its face. In support of their motion, plaintiffs filed points and authorities and a declaration by the campaign manager of CARC averring that during the period between January 12 and 24, a number of individuals or entities had contributed sums in excess of $250 apiece to

CARC and that the aggregate sum of such contributions was $18,600. Plaintiffs' declaration also stated that, at a meeting held on March 30, 1977, defendant, Berkeley Fair Campaign Practices Commission, voted that CARC's receipt of these contributions violated section 602 and that said commission therefore ordered that CARC forfeit to the City of Berkeley all of said contributions which exceeded the aggregate sum of $250 per contributor.[3]

Defendants filed opposing points and authorities, and also filed a declaration by the secretary of the Berkeley Fair Campaign Practices Commission which confirmed the fact that the commission had, on March 30, 1977, found that CARC was in violation of section 602 and had ordered CARC to deposit the sum of $18,600 in the Berkeley general fund.

On September 29, 1977, summary judgment was entered declaring that section 602 was unconstitutional as violative of plaintiffs' rights under the First Amendment to the United States Constitution and article I, section 2, of the California Constitution. Defendants filed a timely notice of appeal from the judgment.

This case is not the first to challenge a part of the Berkeley Election Reform Act of 1974. In *Pacific Gas & Electric Co. v. City of Berkeley* (1976) 60 Cal.App.3d 123, this court held that a section of the act which prohibited

---

[3]Section 604 of the act requires that "any person . . . found guilty of violating the terms of this chapter, . . . shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted . . . to . . . the General Fund of the City."

any person from making a contribution to "'any candidate or committee,'" was invalid as an impermissibly overbroad restriction of the plaintiff's First Amendment right of free speech. We concluded that the unconstitutionality of the provision was established by the recent decisions in *Buckley v. Valeo* (1976) 424 U.S. 1, and *Citizens for Jobs & Energy v. Fair Political Practices Com.* (1976) 16 Cal.3d 671. Although the precise focus of the legal inquiry here differs from that of the *Pacific Gas & Electric Co.* case, there is a substantial similarity of issues and analysis.

The legal principles applicable to this case are clear and well established. The overriding importance of the First Amendment rights of free speech and association require that, on judicial review, any governmental curtailment of these rights be subjected to strict scrutiny. Any such impairment will be sustained only upon a showing that the law is supported by a compelling interest and that this interest is promoted by means which are closely drawn so as to avoid unnecessary interference with protected freedoms. (*Buckley v. Valeo, supra,* 424 U.S. 1, 25; *N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 438; *Hardie v. Eu* (1976) 18 Cal.3d 371, 377.)

On the date when this court decided the *Pacific Gas & Electric Co.* case, *Buckley, Citizens for Jobs & Energy,* and *Schwartz v. Romnes* (2d Cir. 1974) 495 F.2d 844, were the only relevant precedents. Although many jurisdictions had recently enacted laws which placed restrictions on the unlimited ability of citizens to make contributions to candidates, causes and political committees, the constitutionality of these statutes was uncertain. Now there is a considerable body of decisions to which we may look for guidance.

In *Hardie v. Eu, supra,* 18 Cal.3d 371, the California Supreme Court ruled that sections 85200-85202 of the Government Code imposed impermissible restraints upon the First Amendment rights of free speech and association. The statutes which were held unconstitutional prohibited, inter alia, "any 'person' from incurring expenditures 'in furtherance of . . . circulation or qualification of a statewide petition . . .' unless such expenditures are expressly authorized by the 'proponent' " (pp. 374-375), and limited the total expenditures incurred in circulating and qualifying an initiative to 25 cents for each signature needed to qualify the measure.

In *First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, a Massachusetts law which prohibited corporations from making contributions or expenditures " 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters . . .' " (p. 768) was held to be an unconstitutional restriction on the plaintiff's First Amendment rights to disseminate information and to participate in the discussion of public issues which affected the plaintiff's business.

In *C & C Plywood Corp. v. Hanson* (9th Cir. 1978) 583 F.2d 421, the question before the court was the constitutionality of a statute which forbade corporations and banks from making contributions to promote or defeat any ballot issue. Under compulsion of *Buckley* and *Bellotti,* the *Hanson* court held the law invalid as an overly broad restriction of a corporation's right to express its views on issues of general public interest as they affected the corporation.

A recent and most relevant precedent for resolution of the case is *Let's Help Florida v. Smathers* (D.C.N.D. Fla. 1978) 453 F.Supp. 1003. At issue in that case was the validity of a Florida statute which placed a $3,000 ceiling on expenditures by any person or committee in support of, or in opposition to, an issue to be voted on in a statewide election. The limitation on expenditures was struck down as constitutionally defective in that it was not supported by a compelling state interest; also, it employed means which were overly broad and unnecessarily impinged upon protected freedoms.

It is important to note that *Hardie, Bellotti, Hanson* and *Smathers* all involved situations where laws were invalidated on behalf of artificial entities which wished to expend money to influence public opinion on a matter of current public interest. In none of these cases were the plaintiffs attempting to advance or oppose the candidacy of persons seeking public office. We think that this distinction is crucial. In *Buckley v. Valeo, supra,* 424 U.S. 1, which is the seminal decision on legislation regulating the electoral process, the United State Supreme Court decided the constitutionality of various provisions of the Federal Election Campaign Act of 1971 (86 Stat. 3), as amended in 1974 (88 Stat. 1263). The court held, inter alia, that a limitation on the contributions an individual or a committee might make to a particular candidate infringed upon First Amendment rights, but that such a limitation was permissible because it was supported by the state's compelling interest in preventing the possibility and appearance of corruption which is implicit in the perception "that large contributions are given to secure a political *quid pro quo*

from current and potential office holders . . . ." (*Buckley v. Valeo, supra,* at p. 26.) However, the *Buckley* court also held that a limitation on expenditures "'relative to a clearly identified candidate'" (p. 39) in excess of $1,000, a limitation on the expenditures from a candidate's personal resources in excess of certain fixed ceilings, and a limitation on aggregate campaign expenditures by candidates, were all unconstitutional restrictions of First Amendment rights which were not justified by such governmental interests as the prevention of corruption or the appearance of corruption, equalization of the relative financial ability of candidates or groups to influence the outcome of elections, or the reduction of the rapidly increasing costs of campaigns. The court concluded that the restrictions within this second category "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." (Pp. 58-59.)

For our purposes, the central holding of *Buckley* is its distinction between candidates and issue-oriented committees such as CARC. The only governmental interest which the *Buckley* court viewed as compelling was the potential for corruption implicit in contributions to candidates. Such interest is not present with regard to issue-oriented committees. (*Buckley v. Valeo, supra,* 424 U. S. 1, 45.) This distinction permeates the entire *Buckley* opinion.

Nevertheless, defendants insist that section 602 of the Berkeley Election Reform Act of 1974 is justified by Berkeley's interest in obviating the "*mere appearances* of political corruption . . . ." This contention is patently unfounded.

Such an interest, within the context of participation by issue-oriented committees in the electoral process, cannot be accepted as legitimate, nor is it cognizable as "compelling."

Defendants rely on a statement from *Buckley* to the effect that limitations on contributions to candidates "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." (*Buckley v. Valeo, supra,* 424 U.S. 1, 29.) However, defendants take this excerpt out of context. It is found in that section of the opinion where the *Buckley* court held that limitations on contributions to *candidates* were permissible. It has no application to limitations on contributions to issue-oriented committees, since the danger that justifies restrictions in one context is inapplicable in the other.

The implications of defendants' argument have been rejected by the courts. As cogently stated by the United States Court of Appeals, Second Circuit, "Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum." (*Schwartz v. Romnes, supra,* 495 F.2d 844, 852-853.) A recent expression by the United States Supreme Court is even more emphatic: "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (*First National Bank of*

Boston v. Bellotti, supra, 435 U.S. 765, 790.) These cases conclusively demonstrate that defendants' asserted interest is inadequate to sustain section 602's restraints on constitutionally protected rights.

A more basic, and equally unsupported thesis, is defendants' contention that plaintiffs' First Amendment rights are not infringed upon by section 602. Although it is less than explicitly stated, defendants appear to argue that *Buckley* supports the proposition that limitations on the amount of contributions restrict only the quantum of support for a candidate or issue and do not curtail the quantity or quality of free speech. There are two refutations of this contention.

First, while it is true that *Buckley* does contain statements which create the initial impression that contribution limitations are not objectionable if they fall short of an absolute prohibition, these statements do not appear in a discussion of issue-oriented associations. For example, defendants cite the following passage from *Buckley*:

"By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While con-

tributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." (*Buckley v. Valeo, supra,* 424 U.S. 1, 20-21.)

This excerpt will not bear the interpretation which defendants place upon it. The passage is found in a section of the opinion denominated "General Principles"; technically, therefore, it is dicta. Also, the entire tenor of the passage indicates that it was addressed to limitations of contributions to *candidates.* This can be graphically demonstrated by considering the three sentences defendants did not see fit to include: "A contribution serves as a general expression of support for the *candidate* and *his views,* but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's *support for the candidate.*" (P. 21; emphasis added.) The entire passage, read as a whole, indicates that the court's attention was focused upon candidates and the auxiliary committees organized to promote such candidates. It has no direct application to the scope of this case, which is the restriction of contributions to an issue-oriented committee with no connection to a particular candidate. As mentioned previously, this distinction was the central figure of the *Buckley* court's decision, namely, to accord different constitutional status to contributions, de-

pending on the intended recipient and the uses for which such contributions will be employed.

Secondly, the implication in the passage, which defendants appear to embrace, that the quality of a contribution as speech is somehow diffused when given to a committee, is dispelled upon careful analysis of the court's precise language. The court spoke of a contribution as "a general expression of support for the candidate and his views," and characterized a contribution as an "undifferentiated, symbolic act . . . ." (P. 21.) A candidate is likely to have opinions on more than one subject; thus any contribution to him will be "undifferentiated" to the extent that it cannot be allocated for the candidate's use contingent upon his espousal of a particular point of view on a particular issue. Obviously, the situation is entirely different when a contribution is made to an entity dedicated to a single issue. To the extent that a contribution is made to such an issue-oriented body, the situation is not likely to fall within the purview of the *Buckley* court's statement that "the transformation of contributions into political debate involves speech by someone other than the contributor." (P. 21.) There is a tighter nexus between a contributor and a one-issue organization, and a greater likelihood that the contribution will be used as the contributor wishes than is the case with the attenuated relationship between a contributor and a political candidate who is obliged to take a position on more than one issue. "The committee could therefore be viewed as a conduit for the speech of the contributor directed to a single goal." (*Let's Help Florida v. Smathers, supra*, 453 F.Supp. 1003, 1011, fn. 7.)

To accept defendants' position would also penalize the exercise of a collateral First Amendment right. Defendants do not contend that a government may lawfully limit the expenditures of an individual who seeks, by himself, to campaign for or against a particular ballot measure. Yet they would have this court hold that when a contributor joins with others for such purpose, each is then limited to a contribution ceiling of $250. The supreme anomaly is that this would mean that a contributor is entitled to less protection when he exercises his First Amendment rights of free speech *and association*, than if he exercised only his right to free speech. Such a position has been rejected by at least one other court. (*Let's Help Florida v. Smathers, supra*, 453 F.Supp. 1003, 1013-1014.) We conclude that defendants can advance no interest sufficient to justify section 602's restrictions on protected First Amendment liberties. Quite the contrary, their case demonstrates compelling reasons why this type of expression should not be limited.

Two factors need to be considered at this point. The first is the increasing tendency of the California electorate to engage in direct democracy by means of the initiative and referenda process. The second factor, a concomitant of the first, is the skyrocketing costs attending this trend towards greater levels of direct action by citizens. In *Buckley v. Valeo, supra*, 424 U. S. 1, the Supreme Court took note of the effect of measures like section 602 which would seek to limit the basic input of the political process: "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restrict-

ing the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." (P. 19.)

One of the principal reasons for making a contribution is to persuade. It is true that many people fear that unlimited expenditures by large corporations or by wealthy individuals will not add to the electorate's edification, but will instead inundate the electorate with material which is slanted and misleading. We believe that to accept this premise is to slander the intelligence of the voters. Assuming that the sources of contributions are disclosed, as is required under the Berkeley legislation, a contribution limitation evidences a fundamental distrust of the voters' ability to recognize campaigning by special interest advocates within the context of an issue-oriented election. Such a paternalistic attitude is repugnant to the First Amendment: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced, . . . it is a danger contemplated by the Framers of the First

Amendment." (*First National Bank of Boston v. Bellotti, supra*, 435 U.S. 765, 791-792.) Furthermore, within the context of issue-oriented committees, the disclosure requirements have been deemed adequate to prevent the appearance of corruption, the only interest advanced by the defendants in support of section 602. (*Buckley v. Valeo, supra*, 424 U.S. 1, 67.)

The concept of corruption in relation to issue-oriented committees deserves treatment. As has been noted, the term "corrupt" implies the existence or expectation of a political *quid pro quo*. In addition, the term "corruption" subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system, objective "truth" is that which the majority subjectively chooses to adopt. Hence it is delusive to maintain that a declaration by the electorate can be "corrupt." The price of free speech is that we must put up with opinions which we may deem to be the purest humbug, untainted by any trace of truth. The First Amendment does not allow government to deny citizens the right to draw the usual inferences from valueless material, because nothing can be deemed valueless for purposes of the First Amendment, itself a value-free provision whose protection is not dependent upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." (*N.A.A.C.P. v. Button, supra*, 371 U.S. 415, 445.) "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for

us." (*Thomas v. Collins* (1945) 323 U.S. 516, 545 (concurring opinion of Jackson, J.).)

If the purpose for the restriction of contributions was an intent to equalize the position of the parties, it cannot be accepted. The concept that government may restrict the speech of some elements in order to enhance the relative voice of others is wholly foreign to the First Amendment. (*Buckley v. Valeo, supra*, 424 U.S. 1, 48-49; *First National Bank of Boston v. Bellotti, supra*, 435 U.S. 765, 790-791.) In such a case, there would be no guarantee that a stifling of one side would produce a corresponding enhancement of the other. Attempts to restrict the public's access to information are disfavored. It is better to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 266, 269; see also *Mills v. Alabama* (1966) 384 U.S. 214.)

Section 602 is a direct and substantial restriction on plaintiffs' rights of free speech and association. It has employed means which are unnecessarily broad, thereby invading the area of protected freedoms in order to combat a perceived evil which has no legal reality. It has set itself against the First Amendment's basic presupposition "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." (*United States v. Associated Press* (D.C.S.D.N.Y. 1943) 52 F.Supp. 362, 372.)

Defendants have cited no case where such a limitation on contributions to issue-oriented associations has been upheld, and our research has only confirmed this dearth of authority. We conclude, therefore, that the trial court was correct in holding that section 602 is an unconstitutional abridgement of plaintiffs' rights of free speech and association.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

Rouse, J.

We concur:

Taylor, P. J.

Miller, J.

Appendix C

Dobbs & Nielsen
Vigo G. Nielsen, Jr., Esq.
James R. Parrinello, Esq.
Peter A. Bagatelos, Esq.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Plaintiffs

In The Superior Court Of The State Of California
For The County Of Alameda

No. 493837-0

Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association, Mason McDuffie, a California corporation, Berkeley Board of Realtors, a California non-profit association, Betty Geritz, Muriel Rosenkranz and Eva Floystrup,

Plaintiffs,

vs.

City of Berkeley, California, a municipal corporation; The Berkeley City Council; The Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission and Does I through XX, inclusive,

Defendants.

[Filed Sep. 27, 1977]

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS

Plaintiffs' Motion for an order striking the answer herein and entering judgment for plaintiffs came on regularly for hearing before the Court on August 24, 1977. Dobbs & Nielsen by James R. Parrinello appeared as counsel for plaintiffs and Michael Lawson, the City Attorney of Berkeley, appeared as counsel for defendants. The Court examined the declarations and points and authorities submitted in support of and in opposition to said motion, and the matter was argued and submitted.

The Court being fully advised herein and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs' motion herein be, and hereby it is, granted on the ground that Section 602 of the Berkeley Election Reform Act of 1974, as amended, is unconstitutional and in violation of plaintiffs' rights under the First Amendment to the United States Constitution and Article I, Section 9 of the California Constitution;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the answer herein be, and it is, stricken; that the $2,500 bond previously filed by plaintiffs be exonerated; and that plaintiffs be entitled to costs of suit incurred.

Dated: August 24, 1977 and presented for signature and signed September 27, 1977.

JOHN P. SPARROW
John P. Sparrow, Judge
of the Superior Court

Appendix D

Dobbs & Nielsen
Vigo G. Nielsen, Jr., Esq.
James R. Parrinello, Esq.
Peter A. Bagatelos, Esq.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Plaintiffs

In The Superior Court Of The State of California
For The County Of Alameda

No. 493837-0

Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association, et al.,

Plaintiffs,

vs.

City of Berkeley, California, a municipal corporation; et al.,

Defendants.

[Filed Sept. 27, 1977]

JUDGMENT

This action came on before the Court on plaintiffs' Motion for Summary Judgment on August 24, 1977. Dobbs & Nielsen by James R. Parrinello appeared as counsel for

plaintiffs and Michael Lawson, the City Attorney of Berkeley, appeared as counsel for defendants. The cause having been argued and submitted, the Court being fully advised in the premises, and the Court having entered its Order granting summary judgment for plaintiffs,

IT IS ORDERED, ADJUDGED AND DECREED that Section 602 of the Berkeley Election Reform Act of 1974, as amended, is unconstitutional and in violation of plaintiffs' rights under the First Amendment to the United States Constitution and Article I, Section 9 of the California Constitution, and that plaintiffs' recover from defendants their costs of suit incurred herein in the sum of $.

Dated: September 27, 1977

JOHN P. SPARROW
John P. Sparrow, Judge
of the Superior Court

Judgment entered on ....., 1977, in Judgment book Volume ....., page .....

Clerk of the Court

By

Deputy Clerk

Appendix E

Superior Court Of The State Of California
In And For The County of Alameda

CLERK'S NOTICE IN RE ENTRY OF JUDGMENT

Action No. 493837-0

Citizens Against Rent Control/Coalition
For Fair Housing, et al.,
Plaintiffs

vs.

City of Berkeley, California, et al.,
Defendant(s)

You are hereby notified that judgment was entered in the above-entitled action on Sept. 29, 1977 in Book 493 at Page 3.

Dated: Oct. 4, 1977

Rene C. Davidson, County Clerk
By: /s/ D. McEachern
Deputy

Appendix F

City of Berkeley

Election Reform Act of 1974
Ordinance No. 4700-N.S.

• • • •

In Effect: June 4, 1974
Revised to: November 2, 1976

Annotation
Regarding
Berkeley Election Reform Act of 1974
Ordinance No. 4700-N.S.

• • • •

Note: Because of recent court decisions affecting election activity, this Ordinance is annotated; such annotations generally provide for the following:

1. Expenditure *limits* for candidates, committees, independent committees and all other individuals are *invalid.*

2. A "contribution" to one's own campaign is an expenditure, thus no limitation applies.

3. Reporting requirements of purely independent expenditures uncoordinated with a particular candidate are *invalid.*

4. Contribution limits on individuals and their committees are *valid.*

5. General provisions for disclosure and reporting are *valid.*

Annotations Revised to: January 21, 1977

TEXT CHANGES

Sections	Action	Initiative Ordinance No.	Effective Date
112	Amended	4946-N.S.	11/2/76
205	Amended	4945-N.S.	11/2/76
206	Amended	4945-N.S.	11/2/76
207	Repealed	4945-N.S.	11/2/76
401 (a)	Amended	4733-N.S.	11/5/74
401 (a)	Amended	4947-N.S.	11/2/76
401 (b)	Amended	4733-N.S.	11/5/74
401 (b)	Amended	4947-N.S.	11/2/76
401 (c)	Amended	4733-N.S.	11/5/74
401 (c)	Amended	4947-N.S.	11/2/76
401 (d)	Amended	4733-N.S.	11/5/74
401 (d)	Amended	4947-N.S.	11/2/76
401 (e)	Amended	4733-N.S.	11/5/74
401 (e)	Added	4947-N.S.	11/2/76
412 (b)	Amended	4948-N.S.	11/2/76
412 (c)	Amended	4948-N.S.	11/2/76
412 (d)	Amended	4948-N.S.	11/2/76
412 (e)	Amended	4948-N.S.	11/2/76
412 (g)	Amended	4948-N.S.	11/2/76
412 (h)	Amended	4948-N.S.	11/2/76
413	Amended	4945-N.S.	11/2/76
420	Amended	4948-N.S.	11/2/76
424	Amended	4948-N.S.	11/2/76
500	Repealed	4945-N.S.	11/2/76
501	Repealed	4945-N.S.	11/2/76
502	Repealed	4945-N.S.	11/2/76
503	Repealed	4945-N.S.	11/2/76
504	Repealed	4945-N.S.	11/2/76
505	Repealed	4945-N.S.	11/2/76
506	Repealed	4945-N.S.	11/2/76
507	Repealed	4945-N.S.	11/2/76
601	Repealed	4945-N.S.	11/2/76
603 (a)	Amended	4948-N.S.	11/2/76
603 (b)	Amended	4948-N.S.	11/2/76
605	Added	4701-N.S.	6/4/74
704	Amended	4948-N.S.	11/2/76

Ordinance No. 4700-N.S.
Berkeley Election Reform Act of 1974

Be It Ordained by the People of the City of Berkeley:

CHAPTER 1. GENERAL

Sec. 100: This ordinance shall be known and may be cited as the Berkeley Election Reform Act of 1974.

Sec. 101. The people find and declare as follows:

(a) Local government should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth;

(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;

(c) Costs of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from persons and organizations who thereby gain disproportionate influence over governmental decisions;

(d) The influence of large campaign contributors is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate;

(e) Previous laws regulating campaign practices have suffered from inadequate enforcement.

Sec. 102. The people enact this ordinance to accomplish the following purposes:

(a) Receipts and expenditures in municipal election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited;

(b) The amounts that may be expended in municipal elections should be listed in order that the importance of money in such elections may be reduced;

(c) Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this ordinance will be vigorously enforced.

Sec. 103. This ordinance should be liberally construed to accomplish its purposes.

Sec. 104. Reports and statements filed under this ordinance shall be signed under penalty of perjury and verified by the filer. The verification shall state that the filer has used all reasonable diligence in its preparation, and that to the best of his or her knowledge it is true and complete. A report or statement filed by a committee shall be signed and verified by the treasurer, and a report or statement filed by any other organization shall be signed and verified by a responsible officer of the organization or by an attorney or a certified public accountant. Every person who signs or verifies any report or statement required to be filed under this ordinance which contains material which he or she knows to be false is guilty of perjury.

Sec. 105. Reports or statements filed under this ordinance shall be filed with the City Clerk.

Sec. 106. No fee or charge shall be collected by the City Clerk for the filing of any report or statement or for the forms upon which the reports or statements are to be prepared.

Sec. 107. Campaign statements are to be open for public inspection and reproduction during regular City business hours, at the office of the City Clerk and at the Berkeley Public Library during the normal hours it is open to the public. Copies of the statements or parts of statements shall be provided by the City Clerk at a price of not more than ten cents ($0.10) per page copied.

Sec. 108. Every campaign statement shall be preserved by the City Clerk for at least six (6) years from the date upon which it was required to be filed under the terms of this ordinance.

Sec. 109. With respect to reports or statements filed with him or her pursuant to this ordinance, the City Clerk shall:

(a) Supply the necessary forms and manuals prescribed by the Commission;

(b) Notify in advance all candidates and known committees of the dates campaign statements are required;

(c) Report apparent violations of this ordinance to the appropriate agencies; and

(d) Complete and maintain a current list of all reports and statements filed with his or her office.

Sec. 110. Whenever in this ordinance the amount of goods, services, facilities or anything of value other than

money is required to be reported, the amount shall be the estimated fair market value at the time received or expended, and a description of the goods, services or facilities shall be appended to the report or statement.

Sec. 111. If any provision of this ordinance, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this ordinance to the extent it can be given effect, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby, and to this end the provisions of this ordinance are severable.

Sec. 112. The City of Berkeley shall publish, in all newspapers whose editorial offices are in Berkeley, which during at least six (6) months of the year generally publish a newspaper at least five days a week and at least two-thirds of whose newspapers are delivered in Berkeley a list of all contributors of over $50 to all candidates or committees under the heading of Public Notice, at least two times in the seven days prior to the election. In addition, the City of Berkeley shall publish a list of all contributions of over $50 to all candidates or committees under the heading Public Notice, at such time or times and in such newspaper or newspapers as the Commission shall find is appropriate to inform minority group members of such contributions. In addition, the City of Berkeley may publish notices in such newspapers or other media as the Commission shall find is appropriate to inform the public.

CHAPTER 2. DEFINITIONS

Sec. 200. Unless the contrary is stated or clearly appears from the context, the definitions set forth in this chapter shall govern the interpretation of this ordinance.

Sec. 201. "Adjusting an amount for cost of living changes" means adjusting upward or downward by the percent change in the Consumer Price Index for the United States, published by the United States Bureau of Labor Statistics using October 1974 as the base month. The Commission shall calculate the adjusted amounts based on the index level of the month six months prior to an election and shall inform all candidates and committees of said figure on the filing date for that election.

Sec. 202. "Campaign statement" means an itemized report which is prepared on a form prescribed by the Commission and which provides the information required by Chapter 4 of this ordinance.

Sec. 203. "Candidate" for the purposes of this ordinance means a candidate for a Berkeley municipal elective office. "Candidate" means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or makes an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and

whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. "Candidate" also includes any office holder who is the subject of a recall election and any candidate for his or her office, but does not include the proponents or opponents of a recall. The proponents or opponents of a recall are for the purposes of this ordinance the proponents or opponents of a measure.

Sec. 204. "Commission" means the Berkeley Fair Campaign Practices Commission.

Sec. 205. "Committee" means any person or combination of persons that directly or indirectly receives contributions which total more than $250 in a calendar year or makes expenditures exceeding more than $250 in a calendar year for the purpose of influencing or attempting to influence the action of voters for or against the nomination or election of one or more candidates, or the passage or defeat of any measure, including any committee or subcommittee of a political party.

Sec. 206. "Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or in opposition to the nomination or election of one or more candidates or the qualifications for the ballot or voter approval of one or more measures. The term "contribution" includes the purchase of tickets for events such as dinners, luncheons, rallies and similar fund raising events; a candidate's own money or property used

on behalf of his or her candidacy; the granting to a candidate or committee of discounts or rebates not available to the general public; and payments for the services of any person serving on behalf of a candidate or committee, when such payments are not made from contributions the candidate or committee must otherwise report under the terms of this ordinance. The term "contribution" further includes any transfer, gift, loan, advance, deposit, forgiveness of indebtedness, payment of a debt by a third party, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not legally enforceable, received directly or indirectly by a committee from another committee. The term "contribution" shall not include a gift of service or labor, but shall include service or labor for which a payment is made, nor shall the term "contribution" include a gift of the use of personal or real property where the value of such use is not in excess of $50, nor shall it include food and beverages the value of which for any one event is no more than $50.

Sec. 207. Repealed.

Sec. 208. "Cumulative amount" in a campaign statement means the amount contributed or expended since the closing date of the most recent post-election statement which has been filed by the filer. If the filer has not previously filed a campaign statement pursuant to any of these sections, the cumulative amount is the amount contributed or expended since the effective date of this ordinance.

Sec. 209. "Elected officer" means any person who holds an elective office or has been elected to an elective office

but has not yet taken office. A person who is appointed to fill a vacant elective office is an elected officer.

Sec. 210. "Election" shall mean any primary, general or special municipal election held in the City of Berkeley, including an initiative, referendum or recall election.

Sec. 211. "Elective office" means any elective office as defined in the Berkeley City Charter.

Sec. 212. "Expenditure" means a payment, pledge or promise of payment of money or anything of value or other obligation, whether or not legally enforceable, for goods, materials, services or facilities in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or adoption of one or more measures. The term "expenditure" includes any transfer, payment, gift, loan, advance, deposit, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly by one committee to another committee. "Expenditure" also includes the forgiving of a loan or the repayment of a loan by a third party.

Sec. 213. "Filer" means any person filing or required to file any statement or report under this ordinance.

Sec. 214. "Independent committee" means a committee which is not controlled either directly or indirectly by a candidate or controlled committee, and which does not act jointly with a candidate or controlled committee in connection with the receipt or solicitation of contributions or the making of expenditures. A committee may be controlled with respect to one or more candidates and independent with respect to other candidates.

Sec. 215. "Late contribution" means any contribution of $100 or more received after the closing date of the last campaign statement required to be filed prior to an election.

Sec. 216. "Mass mailing" means two hundred (200) or more identical or nearly identical pieces of mail, but does not include a form letter or other mail which is sent in response to a request, letter or other inquiry.

Sec. 217. "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Sec. 218. "Period covered" by a statement or report required to be filed by this ordinance means, unless a different period is specified, the period beginning with the day after the closing date of the most recent statement or report in question. If the person filing the statement or report has not previously filed a report or statement of the same type, the period covered begins on the effective date of this ordinance. Nothing herein shall exempt any person from disclosing transactions which occurred prior to the effective date of this ordinance according to the law then in effect.

Sec. 219. "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company corporation, association, committee, and any other organization or group of persons acting in concert.

CHAPTER 3. BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION

Sec. 300. There is hereby established in Berkeley municipal government the Berkeley Fair Campaign Practices Commission. The Commission shall have nine (9) members, including the chairperson.

Sec. 301. Each member of the Commission shall serve for the same term as the Councilmember appointing them. Members of the Commission may not be reappointed by the same Councilmember. All initial appointments shall be made by September 1, 1974. A member whose term has expired shall serve until his or her successor is appointed.

Sec. 302. A majority of the appointed members shall constitute a quorum.

Sec. 303. The Commission shall elect its own chairperson.

Sec. 304. Vacancies on the Commission shall be filled, within thirty (30) days, by appointment of the same official, or his or her successor, who appointed the prior holder of the position. Appointments to fill vacancies shall be for the unexpired term of the member whom the appointee succeeds. A vacancy or vacancies shall not impair the right of the remaining members to execute all of the powers of the board.

Sec. 305. Each member of the Commission shall be a resident of Berkeley and registered to vote in Berkeley elections. No member of the Commission, during his or her tenure, shall hold or seek election to any other public office, serve as an officer of any political party or partisan organ-

ization or participate in or contribute to a Berkeley municipal election campaign. No member of the Commission shall endorse, support, oppose or work on behalf of or against any candidate or measure in a Berkeley election. Each member of the Commission shall use his or her best efforts to remain independent of candidates and measures in Berkeley elections.

Sec. 306. The Commission shall have a staff which shall act in accordance with Commission policies and regulations and with applicable law to investigate violations and bring proper court action and to assist the Commission in the performance of its duties.

Sec. 307. The Commission has the primary responsibility for the impartial, effective administration of this ordinance.

Sec. 308. The Commission may adopt, amend, and rescind rules and regulations to carry out the purposes of this ordinance, and to govern the procedures of the Commission.

Sec. 309. The Commission shall, in addition to its other duties:

(a) Prescribe forms for reports, statements, notices and other documents required by this ordinance;

(b) Prepare and publish manuals and instructions setting forth methods of bookkeeping and preservation of records to facilitate compliance with and enforcement of this ordinance, and explaining the duties of persons and committees under this ordinance;

(c) Provide assistance to agencies and public officials in administering the provisions of this ordinance;

(d) Determine whether required documents have been filed and, if so, whether they conform on their face with the requirements of this ordinance.

Sec. 310. Any person may request the Commission to issue an opinion with respect to his or her duties under this ordinance. The Commission shall issue the opinion within fourteen (14) days. No person who acts in good faith of an opinion issued to him or her by the Commission shall be subject to criminal or civil penalties for so acting, provided that the material facts are as stated in the opinion request. The Commission's opinions shall be public records and may from time to time be published. The Commission may request the City Attorney to issue an opinion, in which case the City Attorney shall issue the opinion within fourteen (14) days.

Sec. 311. Upon the sworn complaint of any person or on its own initiative, the Commission shall investigate possible violations of this ordinance. Within seven (7) days after the receipt of a complaint under this section, the Commission shall notify in writing the person who made the complaint of the action, if any, which the Commission has taken or plans to take on the complaint, together with the reasons for such action or non-action.

Sec. 312. When the Commission determines there is probable cause for believing this ordinance has been violated, after making a good faith effort to give at least twenty-four (24) hours notice to the person or persons it has probable cause to believe violated this ordinance, it

may hold a hearing to determine if such a violation has occurred. All interested persons may participate in the hearing pursuant to procedures established by the Commission.

Sec. 313. Any person may seek judicial review of any action of the Commission.

Sec. 314. All meetings of the Commission shall be open to the public.

CHAPTER 4. CAMPAIGN DISCLOSURE

Article 1. Organization of Committees

Sec. 400. (a) Each candidate and each committee shall appoint a campaign treasurer. A candidate may appoint himself or herself as his or her campaign treasurer. No contribution and no expenditures shall be accepted or made by or on behalf of a candidate or committee at a time when there is a vacancy in the office of treasurer.

(b) No expenditure shall be made by or on behalf of a candidate or committee without the authorization of the treasurer or that of his or her designated agent.

(c) All contributions received by a person acting as an agent of a candidate shall be reported promptly by such person to the candidate or any of his or her designated agents. All contributions received by a person acting as an agent of a committee shall be reported promptly by the recipient to the committee's treasurer or any of his or her designated agents. "Promptly" as used in this section means not later than five (5) days before the closing date of any campaign statement required to be filed by the treasurer, and immediately if the contribution was received

less than five (5) days before the closing date. All contributions shall be separated from and may not be comingled with any personal funds of the recipient or any other person.

Sec. 401. (a) A campaign treasurer for each candidate and for each and every committee shall establish and manage a campaign expenditure and contribution checking account for the candidate or committee in a bank located in Alameda County. All monetary contributions to the candidate, to a person on behalf of the candidate or to a person on behalf of a committee shall be placed in the candidate's or committee's checking account promptly. Where a candidate or a committee are permitted under Section 414 to file a joint campaign statement, a campaign treasurer may establish and maintain under the terms of this section one joint checking account for the candidate and the committee;

(b) Amounts shall be paid by the campaign treasurer from the campaign contribution checking account only upon receipt of a bill or voucher from a person furnishing goods or services to the candidate or committee which bill or voucher itemizes and identifies the goods or services furnished or to be furnished and lists the unit and total price therefor. All payments of fifty dollars ($50) or more shall be made by a check payable to the person furnishing the goods or services to a candidate or committee;

(c) In the event that, after payment has been made for all goods and services furnished in connection with the campaign of a candidate or committee, there remains a balance in the checking account of the candidate or committee,

the campaign treasurer shall certify that to his or her knowledge the candidate or committee has no further outstanding indebtedness in connection with the campaign, and shall liquidate the contribution checking account by paying the remaining balance in the checking account to the candidate or committee for his or her or its use in any lawful manner within ninety (90) days after the date of election, unless upon good cause an extension is granted by the Commission;

(d) The campaign treasurer shall make available to the Commission, the City Attorney, the City Clerk, the District Attorney, the California Attorney General and the California Secretary of State, or their designees, on demand, the details of any account requested and the records supporting it. In addition the campaign treasurer shall sign waiver permitting the aforementioned authorities and/or designees to inspect the campaign account records maintained by the bank in which the campaign account is opened, and shall maintain a record of every contribution received and every disbursement made from the account which record shall include copies of cancelled checks, bank records, bills and vouchers. Such records shall be maintained for a period of sixty (60) days from the date of final report;

(e) If, prior to the date of the filing of the final report or during the sixty (60) day period immediately thereafter, the Commission reasonably believes a reporting or disclosure requirement has been violated by a candidate or committee, the Commission shall be empowered to conduct or cause to be conducted an independent audit of the books and records of such candidate or committee. The cost of such audit shall be borne by the Commission. If the Com-

mission determines such audit is appropriate the Commission may order such candidate's or committee's books and records maintained for a period in excess of sixty (60) days or until such time as the audit is complete and the Commission has made its final determination in the matter, which determination shall be in writing. In making its determination the Commission shall afford the candidate or committee a full and complete opportunity to appear and offer evidence and testimony in such candidate's or committee's behalf. Such candidate or committee shall be entitled to a copy (or copies) of any independent audit conducted pursuant to this subsection not less than three (3) days before any Commission consideration thereon.

Sec. 402. Every committee shall file with the City Clerk a statement of organization within ten (10) days after it is formed as a committee. Each such committee in existence at the date of enactment of this ordinance shall file a statement with the City Clerk within thirty (30) days after the effective date of this ordinance.

Sec. 403. The statement of organization required by Section 402 shall include:

(a) The name, street address and telephone number, if any, of the committee;

(b) The name, street address and telephone number of each candidate, if any, with which the committee is affiliated or connected;

(c) The full name, street address and telephone number, if any, of the treasurer and other principal officer;

(d) The full name and office sought by each candidate and the title and ballot number if any, of each measure, which the committee supports or opposes;

(e) A statement of whether the committee is independent or controlled, and if it is controlled, the name of each candidate or committee by which it is controlled or with which it acts jointly;

(f) The disposition of surplus funds which will be made in the event of dissolution;

(g) Such other information as shall be required by the rules or regulations of the Commission consistent with the purposes and provisions of this ordinance.

Sec. 404. Whenever there is a change in any of the information contained in the statement of organization, an amendment shall be filed within ten (10) days to reflect the change.

Article 2. Filing of Campaign Statements.

Sec. 410. Each candidate and each committee shall file no fewer than two campaign statements prior to an election and one campaign statement following the election. Campaign statements shall be filed in accordance with the filing dates prescribed by state law. If state law is amended to establish fewer than two filing dates prior to an election and one filing date following the election, the Commission shall set the necessary filing dates.

Sec. 411. A candidate shall verify his or her campaign statement and the campaign statement of each committee subject to his or her control. The verification shall be in accordance with the provisions of Section 104 except that it shall state that he or she has made reasonable inquiry

into the truthfulness and completeness of such campaign statements and that to the best of his or her knowledge the treasurer of each controlled committee used all reasonable diligence in the preparation of the committee's statement. This section does not relieve the treasurer of any committee from the obligation to verify each campaign statement filed pursuant to Section 104.

Sec. 412. Each campaign statement required by this article shall contain the following information:

(a) Under the heading "receipts," the total amount of contributions received, and under the heading "expenditures," the total amount of expenditures made during the period covered by the campaign statement and cumulative amount of such totals.

(b) The total amount of contributions received during the period covered by the campaign statement from persons who have given fifty dollars ($50) or more;

(c) The total amount of contributions received during the period covered by the campaign statement from persons who have given less than fifty dollars ($50);

(d) The total amount of expenditures disbursed during the period covered by the campaign statement to persons who have received fifty dollars ($50) or more;

(e) The total amount of expenditures disbursed during the period covered by the campaign statement to persons who have received less than fifty dollars ($50);

(f) The balance of cash and cash equivalents on hand at the beginning and the end of the period covered by the campaign statement;

(g) The full name of each person from whom a contribution or contributions totalling fifty dollars ($50) or more has been received together with his or her street address, occupation, and the name of his or her employer, if any, or the principal place of business if he or she is self-employed, the amount which he or she contributed, the date on which each contribution was received during the period covered by the campaign statement, and the cumulative amount he or she contributed. In the case of committees which are listed as contributors, the campaign statement shall also contain the full name and street address of the treasurer of the committee. Loans received shall be set forth in a separate schedule and the foregoing information shall be stated in regard to the lender, together with the date and amount of the loan, and if the loan has been repaid, the date of payment and by whom paid;

(h) The full name, street address of each person to whom an expenditure or expenditures totalling fifty dollars ($50) or more has been made, together with the amount of each separate expenditure to each person during the period covered by the campaign statement; a brief description of the consideration for which the expenditure was made; the full name and street address of the person providing the consideration for which an expenditure was made if different

from the payee; and in the case of committees which are listed, the full name and street address of the treasurer of the committee;

(i) In a campaign statement filed by a committee supporting or opposing more than one candidate or measure, the amount of expenditures for or against each candidate or measure during the period covered by the campaign statement and the cumulative amount of expenditures for or against each such candidate or measure;

(j) The full name, residential and business address and telephone number of the filer or, in the case of a campaign statement filed by a committee, the name and telephone number of the committee and the committee's street address;

(k) In a campaign statement filed by a candidate, the full name and street address of any committee, of which he or she has knowledge, which has received contributions or made expenditures on behalf of his or her candidacy, along with the full name, street address and telephone number of the treaturer of such committee.

Sec. 413. Whenever any provision of this chapter requires the filing of a campaign statement by a candidate or committee, a statement signed under penalty of perjury may be filed in lieu thereof that to the best of his or her knowledge not more than two hundred dollars ($200) has been received or expended.

Sec. 414. Two or more committees which act jointly in support of or in opposition to any candidate or measure may file consolidated campaign statements under this ordinance.

Sec. 415. Each late contribution shall be reported by the filing with the City Clerk within forty-eight (48) hours of its receipt the full name, street address, occupation, and the name of the employer, if any, or the principal place of business if self-employed, of the contributor. Filing of a report of late contributions may be by any written means of communication, including but not limited to, telegram or letter, and need not contain an original signature. Late contributions shall be reported on subsequent campaign statements without regard to reports filed pursuant to this section.

Article 3. Prohibitions.

Sec. 420. All monetary contributions fifty dollars ($50) or more shall be made by written instrument containing the name of the donor and the name of the payee.

Sec. 421. No contribution shall be made, directly or indirectly, by any person in a name other than the name by which such person is identified for legal purposes.

Sec. 422. No contribution shall be made, directly or indirectly, of anything belonging to another person or received from another person on the condition that it or part of it be used as a contribution. No contribution shall be made, directly or indirectly, by any person on behalf of another person.

Sec. 423. No expenditure shall be made, other than overhead or normal operating expenses, by an agent or independent contractor, including but not limited to an advertising agency, on behalf of or for the benefit of any candidate or committee unless it is reported by the candidate or committee as if the expenditure were made directly by the candidate or committee. The agent or independent contractor shall make known to the candidate or committee all information required to be reported by this section. This section is intended as a limitation and does not authorize any expenditures which are otherwise prohibited by this ordinance.

Sec. 424. No person shall make an anonymous contribution or contributions to a candidate, committee or any other person totalling more than fifty dollars ($50) in a calendar year. An anonymous contribution of more than fifty dollars ($50) shall not be kept by the intended recipient but instead shall be promptly paid to the City Auditor for deposit in the General Fund of the City.

Sec. 425. No person shall make an expenditure for the purpose of sending a mass mailing unless the postage is paid by postage meter or the mail is sent by first class or third class bulk rate mail. The bulk rate number or meter number shall be stated in a campaign statement, and a copy of every mass mailing in support of or in opposition to a candidate or measure shall be sent to the Commission. Such copies sent to the Commission shall be public record.

CHAPTER 5. LIMITATIONS ON EXPENDITURES

Article 1. Candidates. Repealed

Article 2. Measures.

Sec. 510. "Expenditures" as used in this article mean expenditures to influence the "action" of voters for or against the placing of a measure on the ballot or for or against the adoption of any measure which has qualified to be placed on the ballot.

Sec. 511. No committee shall make expenditures with respect to any measure in excess of one hundred dollars ($100) without complying with the requirements of this article. For purposes of this article, two or more committees which act jointly in the receipt or solicitation of contributions or the making of expenditures shall be deemed a single committee.

Sec. 512. Any committee which intends to make expenditures in excess of one hundred dollars ($100) with respect to any measure, shall, not later than twenty-eight (28) days prior to an election, file a statement of intent with the Commission, which shall identify the measure and state whether the committee intends to support or oppose the measure and the amount the committee intends to spend. The Commission shall approve the statement of intent, subject to the limitations set forth in this article, if it finds that the committee has the intention and ability to incur the expenditures. Not less than twenty-one (21) days prior to the election, the Commission shall notify each committee whose statement has been approved of the limitation on expenditures that is applicable to the committee.

Sec. 513. Aggregate expenditures in support of or in opposition to a measure shall not exceed seventy-five hundred dollars ($7500) or ten cents ($0.10) multiplied by the number of registered voters, whichever is less, and adjusted in all years after October 1974 for cost of living changes as defined in Section 201.

Sec. 514. (a) Except as provided in Section 514(b), if the aggregate amount set forth in the approved statements of intent filed in support of or in opposition to a measure exceeds the limitations contained in Section 513, the Commission shall apportion the permissible expenditures among the committees which have filed statements of intent on the basis of a strictly arithmetic formula which shall be prescribed by regulation, unless all the committees agree among themselves to a different allocation, in which case the Commission may apportion pursuant to the agreed-to allocation.

(b) If the measure is placed on the ballot by the circulation of petitions, the electors who signed the notice of intent to circulate the petitions or their delegated representatives shall constitute the official committee and shall be allotted as much as they request, up to eighty percent (80%) of the allowed expenditures in Section 513.

Sec. 515. Expenditures incurred by an ongoing organization, not formed specifically for the purpose of influencing voters, for communication strictly limited to its own members, and not to the general public, shall not be included within the limitations contained in Sections 511, 512 and 513.

Sec. 516. If an expenditure is incurred in support of or in opposition to more than one measure, the entire amount is charged to each measure for the purposes of Section 513.

Sec. 517. No person shall receive any compensation for the circulation of petitions to place a measure on the ballot.

Sec. 518. Positions taken by a candidate on a measure shall not be charged to the committee supporting or opposing the measure if the expenditure is paid for by the candidate or committee supporting the candidate. Such expenditures shall be charged against the candidate's expenditure limit.

CHAPTER 6. LIMITATIONS ON CONTRIBUTIONS

Sec. 600. No person other than a candidate shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to such candidate to exceed two hundred and fifty dollars ($250).

Sec. 601. Repealed

Sec. 602. No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

Sec. 603. (a) The first $1,500 raised in contributions of $50 or less are exempt from disclosure requirements.

Any contributions of $50 or less received after the $1,500 are not subject to the exemption of Section 412 for contributions of less than $50.

(b) In addition to any other limitations, all the committees spending more than $100 in support or opposition to a measure cannot respectively keep or expend for or against in the aggregate more than one thousand dollars ($1,000) ($1,000 for all those supporting and $1,000 for all those opposing the measure) in contributions, except for contributions of fifty dollars ($50) or more and contributions as to which disclosures are made in campaign statements as if such contributions were fifty dollars ($50) or more. If there is more than one such committee opposing or supporting a measure, the Commission shall determine pursuant to its rules what part of said $1,000 each committee can keep and expend and shall inform the committee of the amount at least twenty-one (21) days before the election. Any excess shall be paid promptly to the City Auditor for deposit in the General Fund of the City.

Sec. 604. If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Sec. 605. No proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, or labor union shall make a contribution to any candidate

or committee, directly or indirectly, and no campaign treasurer shall solicit or accept any such contribution.

CHAPTER 7. ENFORCEMENT

Article 1. Penalties.

Sec. 700. Any person who knowingly or willfully violates any provision of this ordinance is guilty of a misdemeanor punishable by a fine for each violation of three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

Sec. 701. If a judgment is entered against the defendant or defendants in an action brought under Section 711, the plaintiff shall receive fifty percent of the amount recovered. The remaining fifty percent shall be deposited in the General Fund of the City. In an action brought by the Commission on the City Attorney, the entire amount recovered shall be paid to the General Fund of the City.

Sec. 702. If after his or her election a candidate receives a final judgment of conviction of a violation of any provision of this ordinance, the office of such candidate shall be forfeited and such office shall become vacant immediately, thereupon or on the date upon which the candidate, if he or she is not an incumbent, would otherwise take office.

Sec. 703. If a candidate receives a final judgment of conviction of a violation of this ordinance at any time prior to his or her election, his or her candidacy shall be terminated immediately and he or she shall be no longer eligible for election.

Sec. 704. No person convicted of a violation of this ordinance shall be a candidate for City elective office for a period of four (4) years from and after the date of his or her conviction. A plea of nolo contendere shall be deemed a conviction for purposes of this section.

Article 2. Enforcement.

Sec. 710. Any person who believes that a violation of any portion of this ordinance has occurred may file a complaint with the Commission. If the Commission determines that there is reason to believe a violation of this ordinance has occurred, it shall make an investigation. If the Commission has reason to believe that a violation of this ordinance has occurred or is about to occur, it may institute action at law or equity to enforce and compel compliance with the provisions of this ordinance.

Sec. 711. Any resident of the City of Berkeley who believes that a violation of this ordinance has occurred or is about to occur, may institute such action at law or equity for injunctive relief and to compel compliance with the provisions of this ordinance.

Sec. 712. Before instituting an action pursuant to Section 711, a person must file a written request with the Commission asking it to commence the action. The request shall include a clear statement of the facts indicating that a cause of action exists. The Commission shall respond within seven (7) days after receipt of the request stating whether or not it intends to file the action. If the Commission states that it intends to file the action and files the action within ten (10) days thereafter, no other action may be brought by any person unless the action brought by the

Commission is dismissed without prejudice. If the Commission states that it does not intend to file the requested action or fails to do so, then the resident requesting that the action be brought may file and prosecute the action to enforce or compel compliance with this ordinance.

This ordinance was approved by the electors of the City of Berkeley at the Special Municipal Election consolidated with the Consolidated Primary Election held in the City of Berkeley on June 4, 1974.

In effect: June 4, 1974

Appendix G

Michael Lawson, City Attorney
2171 McKinley Avenue, Room 220
Berkeley, California 94704
Telephone: (415) 644-6380
Attorneys for Defendants

Superior Court Of California
County Of Alameda

No. 493837-0

Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association, Mason McDuffie, a California Corporation, Berkeley Board of Realtors, a California non-profit association, Betty Geritz, Muriel Rosenkranz and Eva Floystrup,

Plaintiffs,

vs.

City of Berkeley, California, a municipal corporation; The Berkeley City Council; The Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission and Does I through XX, inclusive,

Defendants.

DECLARATION OF EDYTHE CAMPBELL

I, Edythe Campbell, first being duly sworn, declare as follows:

I am the duly appointed City Clerk of the City of Berkeley and in that capacity I am responsible for the orderly administration of municipal elections in the City of Berkeley, including the General Municipal Election to be held April 19, 1977.

I am also Secretary to the Berkeley Fair Campaign Practices Commission. This Commission was created by the "Berkeley Election Reform Act of 1974 (Ordinance 4700-N.S.)" and its general purpose is to administer the reporting, disclosure and regulatory provisions of the Act.

In January, 1975, I was advised by the then City Attorney, Donald P. McCullum, that Section 605 of the Act was invalid as a result of a decision of Judge Gordon Minder of the Alameda County Superior Court. I was informed by the City Attorney that this decision was a result of a lawsuit brought by Pacific Gas and Electric Company (PG&E) seeking to invalidate that Section of the Act which limited both campaign expenditures and campaign contributions by corporations with respect to municipal ballot measures.

As a result of this information from the City Attorney I annotated Section 605 of the Act by placing in the margin of all copies of the Act the following words:

"Invalid; do not enforce."

In January, 1976, I was advised by the then acting City Attorney, Lois L. Johnson, that certain additional sections of the Act were invalid, including Section 602, as a

result of the final judgment entered in *PG&E v. City of Berkeley,* Section 602 of the Act was then annotated to read:

"Do not enforce."

In March, 1976, the then acting City Attorney, Lois L. Johnson, advised me that certain additional provisions of the Act were invalid as a result of the U.S. Supreme Court's decision in *Buckley v. Valeo,* a decision involving the review of federal election campaign laws.

Based upon her interpretation of the *Buckley v. Valeo* case, the acting City Attorney advised me that additional annotations should be placed in the margin of the Act indicating such sections as being invalid.

Although the *Buckley v. Valeo* case did not consider directly the Berkeley ordinance the acting City Attorney felt the principles established by the U.S. Supreme Court were sufficiently applicable to the Berkeley law as to require general adherence to the *Buckley v. Valeo* judicial findings.

In July, 1976, the California Court of Appeal affirmed the earlier decision of Judge Gordon Minder. The Court of Appeal held Section 605 invalid as an unwarranted intrusion of First Amendment safeguards as to corporations.

Based upon this appellate decision, the City Attorney, Michael Lawson, on August 25, 1976, reiterated the advice I had received from the previous City Attorney that Section 605 was invalid and should not be enforced. Consequently I amended the annotation on Section 605 to refer to the decision of the appellate court.

In December, 1976, I received an inquiry from Peter Bagatelos, an attorney, regarding the status of Section 602 of the Act since this section was annotated "do not enforce." Since this annotation was placed in the margin on the advice of a previous City Attorney, I inquired of Mr. Lawson (present City Attorney) whether the annotation was still applicable.

Mr. Lawson advised me on or about December 30, 1976, that he would review the entire ordinance and all annotations placed thereon to date and advise declarant and the Commission as to the validity of Section 602 as well as all other sections of the Act which had been annotated.

On January 12, 1977, at a regular Commission meeting, Mr. Lawson advised declarant and the Commission in writing that in his opinion Section 602 was valid and enforceable, based upon his reading of *Buckley v. Valeo*. Mr. Lawson further stated that campaign committees which relied upon the published Act carrying the annotation "do not enforce" adjacent to Section 602 should not be penalized for having accepted contributions in excess of $250.

On January 24, 1977, the City Attorney provided my office with a newly-annotated Act which was published by my office that day. This version of the Act did not carry a marginal annotation adjacent to Section 602.

Between January 13, 1977, and January 21, 1977, the Committee Against Rent Control (CARC) collected $20,-850, $18,600 of which consisted of contributions, in the aggregate, exceeding $250.

On March 30, 1977, as a result of charges made against CARC, the Commission found CARC had violated Section 602 of the Act between January 13, 1977 to January 21, 1977, by accepting the aggregate sum of $18,600 over $250.

The Commission ordered CARC, pursuant to Section 604, to pay the $18,600 to the City Auditor for deposit into the General Fund.

In making its March 30 order the Commission felt CARC knew as of January 12 that Section 602 would be enforced and that notwithstanding such knowledge CARC accepted contributions in excess of $250 for an eight-day period.

I swear the foregoing is true and correct.

Executed this 11th day of April, 1977, at Berkeley, California.

/s/ EDYTHE CAMPBELL
Edythe Campbell

Appendix H

Let's Help Florida, a Political Committee, and
Paul M. Bruun,
Plaintiffs-Appellees,

vs.

Jesse M. McCrary, Jr., as Secretary of State of Florida,
et al.,
Defendants-Appellants.

Dade Voters For a Free Choice, a Political Committee, and
the Florida Restaurant Association, Inc.,
Plaintiffs-Appellees,

vs.

George Firestone, Secretary of State of Florida, et al.,
Defendants-Appellants.

Nos. 78-2497, 79-2091.

United States Court of Appeals,
Fifth Circuit.

July 11, 1980.

Appeals from the United States District Court for the Northern District of Florida.

Before Thornberry, Frank M. Johnson, Jr. and Henderson, Circuit Judges.

Thornberry, Circuit Judge:

In these consolidated cases we must decide whether Florida statutes that restrict the size of contributions to a single political committee in a referendum election violate the first amendment rights of persons who want to contribute more than the maximum amount allowed by the statutes. Because campaign contributions implicate important first amendment rights and because Florida has shown no sufficiently important interest to justify restricting the contributions in a referendum election, we affirm the district court decisions declaring these statutory restrictions unconstitutional.

I. FACTS.

Let's Help Florida is a political committee organized and registered under Florida law for the express purpose of conducting "a public education campaign urging the passage of a constitutional amendment which will legalize casino gambling in Southern Florida." The committee waged a petition drive under the initiative provisions of the Florida constitution in an effort to place the casino gambling proposal on the ballot in the November 1978 election. The committee does not support any individual candidate.

The Florida legislature enacted a comprehensive election code effective January 1, 1978. Section 106.08(1)(d) of the code restricts the size of contributions to a single political committee like Let's Help Florida:

> (1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:
>
> . . . . .

(d) To any political committee in support of, or in opposition to, an issue to be voted on in a statewide election, $3,000.

The election code does not restrict the number of contributions a person can make to different political committees, nor does the code restrict the total amount of independent direct expenditures that a person can make without control by, coordination with, or consultation with any candidate, committee, or agent thereof. Fla.Stat.Ann. § 106.011(5) (West. Supp.1980). Political committees must disclose a variety of information upon registration. Fla.Stat.Ann. § 106.03 (West. Supp.1980). Committees must also disclose information about all contributors, even those who make very small contributions. Fla.Stat.Ann. § 106.07 (West. Supp.1980). Various civil and criminal penalties apply for violations of the election code.

In February 1978 Let's Help Florida and a person desiring to contribute more than the statutory maximum amount filed suit against the secretary of state, attorney general, director of the division of elections, and the members of the state elections commission to invalidate section 106.08 (1)(d) under the first and fourteenth amendments. In May 1978 the district court issued a decision invalidating the statute on constitutional grounds.

Dade Voters for a Free Choice is a political committee organized and registered under Florida law to oppose passage of an ordinance that would prohibit smoking in public places; the voters considered this proposal in a county-wide referendum election in May 1979. The committee does not support any individual candidate. Contributions to the Dade Voters committee were restricted to one thousand

dollars by Fla.Stat.Ann. § 106.08(1)(e) (West Supp.1980), which applies to countywide elections in the same way that section 106.08(1)(d) applies to statewide elections.

In February 1979 Dade Voters and a party desiring to contribute more than the statutory maximum amount sued the secretary of state, director of the division of elections, and members of the elections commission to invalidate section 106.08(1)(e) under the first and fourteenth amendments. In March 1979 the district court relied upon its earlier decision in the *Let's Help Florida* case to strike down the statute.

II. FEDERAL JURISDICTION AND REVIEW.

Appellants in the *Dade Voters* case raise several contentions questioning federal jurisdiction and review. Appellants first contend that the district court lacked jurisdiction because no case or controversy existed between the parties. The Supreme Court summarized the test to determine whether a case or controversy exists with regard to first amendment rights in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301, 2309, 60 L.Ed. 2d 895 (1979):

> When the plaintiff has alleged an intention to engage in a course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973).

In *Babbitt* the Supreme Court allowed a union to challenge the constitutionality of a state statue regulating election procedures, consumer publicity, and criminal sanctions, even though no elections or prosecutions had yet occurred. The Court said that

> . . . when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Steffel v. Thompson,* 415 U.S. 452 at 459, 94 S.Ct. 1209 at 1216, 39 L.Ed.2d 505.
>
> . . . Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution . . .

99 S.Ct. at 2310-11. The Dade Voters committee wanted to receive larger contributions than the statute allowed. The committee had already received a few contributions larger than the statutory maximum, and other potential donors, including the co-plaintiff in this case, indicated that they would make larger contributions if the law allowed them to do so. The defendants have the statutory duty to enforce the election code. Fla.Stat.Ann. § 106.22-106.27 (West Supp. 1980). They have not disavowed any intention to enforce the statute. On the contrary, counsel for the defendants said that the state would be compelled to begin proceedings against the plaintiffs if the statute is upheld. Record, Vol. III, at 41-42. These facts show that the plaintiff's fear of prosecution is not imaginary or wholly

speculative, and that a sufficient case or controversy exists to establish federal jurisdiction under *Babbitt*, and under Fifth Circuit cases such as *International Society for Krishna Consciousness v. Eaves*, 601 F.2d 809, 817-19 (5th Cir. 1979) and *Septum, Inc. v. Keller*, 614 F.2d 456, 459 (5th Cir. 1980). This conclusion is not contrary to the Second Circuit opinion in *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41 (2d Cir. 1979). In *St. Martin's Press* the court held that no case or controversy existed when a publisher brought a first amendment challenge to enjoin state prosecutors from enforcing a child pornography statute against a book that was outside the scope of the statute, and against which the prosecutors declared they would not enforce the statute. 605 F.2d at 44-45. In contrast to St. Martin's Press, plaintiffs in this case desire to engage in conduct that is in clear violation of a statute which the state has indicated it will enforce against them.

Appellants also contend that the district court should have abstained from hearing this case under principles announced in *Younger v. Harris*. 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* abstention principles are inapplicable to this case, however, because no state prosecution was pending when the plaintiffs filed suit. *Steffel v. Thompson*, 415 U.S. 452, 475, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974).

Appellants finally contend that the district court should not have issued injunctive relief. A federal court may enjoin state officials from enforcing an unconstitutional statute. *Ex parte Young*, 209 U.S. 123, 165-68, 28 S.Ct. 441, 456-457, 52 L.Ed. 714 (1908). An injunction is proper in

this case because no legal remedy could correct the irreparable injury to plaintiffs' first amendment rights, important for an election only weeks away. See *Elrod v. Burns*, 427 U.S. 347, 373-74 & n. 29, 96 S.Ct. 2673, 2689-2690, 49 L.Ed.2d 547 (1976) (loss of first amendment rights unquestionably constitutes irreparable injury).

III. FIRST AMENDMENT

The right to make political contributions is protected under the first amendment as an important freedom of association. *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976). In *Buckley* the Supreme Court struck down federal restrictions upon direct political expentures in candidacy elections, but upheld similar restrictions upon contributions to a candidate or to a committee supporting a candidate. As a general preface to its decision, the Court explained that contributions required less first amendment protection than did direct expenditures:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for its permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.
>
> . . . . . .
>
> The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend

> such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

424 U.S. at 21-22, 96 S.Ct. at 636.

Even though contributions receive less first amendment protection than do direct expenditures, a state may restrict political contributions only if the state "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25, 96 S.Ct. at 638. The sole governmental interest that the Supreme Court recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate. 424 U.S. at 26-29, 96 S.Ct. at 638-640. The governmental interest in restricting contributions to candidates is substantial because actual corruption resulting from a candidate's dependence upon large individual contributors would undermine the integrity of representative democracy, and even the appearance of corruption that arises from public awareness of the possibilities for abuse would erode confidence in the democratic system. *Id.*

The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly

decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment. The distinction between the state's interest in regulating a candidacy election and in regulating a referendum election was discussed by the Supreme Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1976). In striking down a Massachusetts statute that prohibited a corporation from making expenditures or contributions for publicity in a referendum election unrelated to the corporation's immediate business, the Court observed that

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." . . . We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."

435 U.S. at 790, 98 S.Ct. at 1423 (footnotes and citations omitted). This distinction between candidacy and referendum elections has been recognized by several other courts in striking down state restrictions upon contributions for

referendum elections. *See C & C Plywood Corporation v. Hanson,* 583 F.2d 421, 424-25 (9th Cir. 1978) (invalidating Montana law that prohibited corporations from making contributions in a referendum election); *Citizens Against Rent Control v. City of Berkeley,* 99 Cal.App.3d 736, 160 Cal.Rptr. 448, 451-55 (Ct.App., 1st Dist. 1979) (invalidating city ordinance that restricted the size of contributions in a referendum election); *Schwartz v. Romnes,* 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute prohibiting corporate expenditures for political purposes must be construed narrowly under first amendment so that corporations may make contributions in referendum elections). With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Appellants also contend that the restrictions upon the size of contributions to a single committee are necessary to promote adequate disclosure about who is financing a campaign. In the absence of these restrictions, appellants contend that corporations and wealthy individuals would mask their participation in a referendum campaign by funneling large sums of money into a committee which the public would see only under an innocuous title such as "Let's Help Florida" or "Dade Voters for a Free Choice." Although promoting disclosure of campaign contributors is an important state interest, the restrictions upon political contributions in sections 106.08(1)(d), (e) cannot be justified as disclosure measures because the statutes are not closely drawn to avoid unnecessary abridgment of associational freedoms. These statutes that restrict the amount a person may contribute to a single committee do

little to promote disclosure. The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute. These multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors.

Florida can and does effectively promote the disclosure of large contributors through measures that are less harmful to first amendment rights. For example, sections 106.03 and 106.07 of the Florida Election Code require political committees to register with the state and to file information about each contribution and contributor throughout the campaign. This information is available to the public and may be published through newspapers and other media. Section 106.143 requires disclosure of the source of payment for all political advertisements and campaign literature. Measures such as these provide adequate disclosure without directly restricting contributions or other important first amendment rights. *See C & C Plywood,* 583 F.2d at 425 (rejecting argument that state interest in promoting disclosure justifies prohibition of corporate contributions in a referendum election).

Because the Florida statutes that restrict the size of contributions in a referendum election abridge important first amendment rights and are ill-suited for preventing corruption or for promoting disclosure, we affirm the decision in the court below.

AFFIRMED.

Appendix I

Dobbs & Nielsen
Vigo G. Nielsen, Jr., Esq.
James R. Parrinello, Esq.
John E. Mueller, Esq.
The Alcoa Building, Suite 2500
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs and Appellants

Supreme Court of California
No. S.F. 24121

Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California non-profit association; Betty Geritz; Muriel Rosenkranz and Eva Floystrup,

Plaintiffs and Appellants,

vs.

City of Berkeley, California, a municipal corporation; The Berkeley City Council; The Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission,

Defendants and Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Citizens against Rent Control/Coalition for Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California nonprofit association; Betty Geritz; Muriel Rosenkranz and Eva Floystrup, the plaintiffs and appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of this Court entered on August 7, 1980.

This appeal is taken pursuant to section 1257(2) of Title 28 of the United States Code.

Dated: October 28, 1980.

Dobbs & Nielsen
Vigo G. Nielsen, Jr., Esq.
James R. Parrinello, Esq.
John E. Mueller, Esq.

By s/s JAMES R. PARRINELLO
Attorneys for Plaintiffs and Appellants

Office Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737

IN THE

Supreme Court of the United States

October Term, 1980

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOINT APPENDIX

VIGO G. NIELSEN, JR.
Counsel of Record
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500,
The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Appellants

NATALIE E. WEST
City Attorney
CHARLES O. TRIEBEL, JR.
Counsel of Record
2180 Milvia St., 5th Fl.
Berkeley, California 94704
Telephone: (415) 644-6380
Attorneys for Appellees

APPEAL DOCKETED November 5, 1980
PROBABLE JURISDICTION NOTED February 23, 1981

CHRONOLOGICAL INDEX

	Page
1. COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF	1
2. APPENDIX A TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR INJUNCTIVE AND DECLARATORY RELIEF	15
3. EXHIBITS TO COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF	18
(a) EXHIBIT "D" — December 17, 1976 letter of Peter Bagatelos	18
(b) EXHIBIT "E" — Memorandum dated January 12, 1977 by Michael Lawson	20
(c) EXHIBIT "F" — Declaration of Donald Solem, Marisa Samuels, Peter A. Bagatelos	23
(d) EXHIBIT "G" — Declaration of M.R. Griffin	25
(e) EXHIBIT "H" — Declaration of Victor Stachura	28
(f) EXHIBIT "I" — Declaration of Donald L. Solem	31
(g) EXHIBIT "J" — Declaration of Zan L. Beckstead	36
(h) EXHIBIT "K" — Declaration of Andres R. Bussoud	38
(i) EXHIBIT "L" — Declaration of A. Gordon Nicolson	41
(j) EXHIBIT "M" — Declaration of John P. Hannigan	44
(k) EXHIBIT "N" — Declaration of Irving Betz and Sam Genirberg	47
4. TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE	50
5. ORDER SUSTAINING APPLICATION FOR PRELIMINARY INJUNCTION	52
6. AMENDMENT TO COMPLAINT	54
7. ANSWER	59

Page

8. NOTICE OF MOTION FOR SUMMARY JUDGMENT 64
9. MOTION FOR SUMMARY JUDGMENT — First Four Pages 67
10. EXHIBITS TO MOTION FOR SUMMARY JUDGMENT 71
    (a) EXHIBIT "A" to Motion for Summary Judgment — Declaration of Donald L. Solem 71
    (b) EXHIBIT "B" to Motion for Summary Judgment — Declaration of Victor Stachura 73
    (c) EXHIBIT "C" to Motion for Summary Judgment — Declaration of M.R. Griffin 75
11. ANSWER TO AMENDED COMPLAINT 76
12. STIPULATION AND ORDER RE: SUMMARY JUDGMENT 79
13. NOTICE OF APPEAL AND NOTICE TO PREPARE REPORTER'S AND CLERK'S TRANSCRIPTS (Appeal to Court of Appeal) 81
14. NOTICE TO ATTORNEY IN RE: NOTICE OF APPEAL 84

ALPHABETICAL INDEX

	Page
1. Amendment to Complaint	54
2. Answer	59
3. Answer To Amended Complaint	76
4. Appendix "A" To Memorandum Of Points And Authorities In Support Of Application For Injunctive And Declaratory Relief	15
5. Complaint	1
6. Exhibits To Complaint For Injunctive And Declaratory Relief	18
7. Exhibits To Motion For Summary Judgment	71
8. Motion For Summary Judgment	67
9. Notice Of Appeal And Notice To Prepare Clerk's And Reporter's Transcript	81
10. Notice Of Motion For Summary Judgment	64
11. Notice To Attorney In Re Notice Of Appeal	84
12. Order Sustaining Application For Preliminary Injunction	52
13. Stipulation And Order	79
14. Temporary Restraining Order And Order To Show Cause	50

DOCUMENTS APPEARING IN THE APPENDIX TO JURISDICTIONAL STATEMENT

	PAGE
Opinion of the Supreme Court of the State of California	A-1
Opinion of the Court of Appeal of the State of California	A-32
Order Granting Summary Judgment for Plaintiffs	A-48
Summary Judgment	A-50
Clerks Notice In Re Entry of Judgment	A-52
City of Berkeley Election Reform Act of 1974, Ordinance No. 4700-N.S.	A-53
Declaration of Edythe Campbell	A-84
Opinion of the United States Court of Appeals, Fifth Circuit in *Let's Help Florida* v. *McCrary*	A-89
Notice of Appeal to the Supreme Court of the United States	A-100

DOCKET ENTRIES

1.	Complaint for Injunctive & Declaratory Relief and Supporting Memorandum of Points and Authorities..	April 6, 1977
2.	Temporary Restraining Order & Order to Show Cause.....	April 6, 1977
3.	Defendants' Memorandum of Points & Authorities in Opposition to Preliminary Injunction	April 11, 1977
4.	Order Sustaining Application for Preliminary Injunction	April 18, 1977
5.	Amendment to Complaint	April 27, 1977
6.	Answer.....	May 26, 1977
7.	Motion for Summary Judgment	August 5, 1977
8.	Defendants' Memorandum of Points & Authorities in Opposition to Motion for Summary Judgment.....	August 22, 1977
9.	Answer to Amended Complaint.....	August 24, 1977
10.	Order Granting Summary Judgment for Plaintiffs	September 27, 1977
11.	Summary Judgment	September 27, 1977
12.	Clerk's Notice in re Entry of Judgment	October 4, 1977
13.	Stipulation and Order	November 17, 1977
14.	Notice of Appeal and Notice to Prepare Reporters and Clerk's Transcripts	December 1, 1977
15.	Notice to Attorney in re Notice of Appeal	December 2, 1977
16.	Appellants' Brief	April 24, 1978
17	Respondents' Brief.....	May 22, 1978
18.	Appellants' Reply Brief.....	June 12, 1978
19.	Amicus Curiae Brief of the City & County of San Francisco In Support of the City of Berkeley.....	February 22, 1979

20.	Respondents' Reply to Amicus Curiae Brief of the City & County of San Francisco	May 8, 1979
21.	Opinion of the California Court of Appeal	December 13, 1979
22.	Petition for Hearing in the California Supreme Court	January 22, 1980
23.	Answer to Petition for Hearing	February 1, 1980
24.	Order Granting Petition For Hearing in the California Supreme Court	February 27, 1980
25.	Amicus Curiae Brief of the City & County of San Francisco	March 17, 1980
26.	Respondents' Reply to Amicus Curiae Brief of the City & County of San Francisco	March 27, 1980
27.	Amicus Curiae Brief of Santa Monica Fair Housing Alliance, et al.	April 8, 1980
28.	Respondents' Reply to Amicus Curiae Brief of Santa Monica Fair Housing Alliance, et al.	May 2, 1980
29.	Opinion of the California Supreme Court	August 7, 1980
30.	Notice of Appeal to the Supreme Court of the United States	October 28, 1980

DOBBS, DOYLE & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Apr 6 1977
RENE C. DAVIDSON, *County Clerk*
LOUIS HURLEY, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON MCDUFFIE, a California Corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

NO. 493837-0

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs and each of them allege as follows:

FIRST CAUSE OF ACTION

DECLARATORY RELIEF

1. Plaintiff CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING (hereinafter "CARC") is an unincorporated association duly organized and existing under and by virtue of the laws of the State of California and the laws of the City of Berkeley, and, as such, is doing business within the City of Berkeley and the County of Alameda.

2. CARC is organized with more than 1,300 individual supporters, many of whom own real property for both residential or rental purposes in the City of Berkeley, and who are registered voters in said City (see attachment to Exhibit I hereto).

3. CARC is a "committee" registered pursuant to and in accord with Section 402 of the Berkeley Election Reform Act of 1974, as amended, (hereinafter "the Act") and pursuant to California Government Code Sections 84100-84101.

4. Plaintiffs BETTY GERITZ, MURIEL ROSENKRANZ, and EVA FLOYSTRUP are contributors to CARC and are owners of real property in the City of Berkeley, and Plaintiffs BETTY GERITZ and MURIEL ROSENKRANZ are registered voters of Berkeley.

5. Plaintiff BERKELEY BOARD OF REALTORS is composed of approximately 450 members who are residents of or who conduct business within the City of Berkeley, and who own real property for rental purposes in Berkeley and on January 17, 1977, contributed the sum of $5,000 to CARC, in support and furtherance of its objectives. (See Declaration attached hereto as Exhibit H).

6. Plaintiff MASON-MCDUFFIE sells, exchanges, rents, insures, and owns real property in the City of Berkeley, and on January 17th contributed the sum of $1,000 to CARC in support and furtherance of its objectives. (See Declaration attached hereto as Exhibit G).

7. Defendant CITY OF BERKELEY is a Charter City organized and existing under the Constitution and laws of the State of California. Defendant BERKELEY CITY COUNCIL was

and now is the duly elected legislative body of the City of Berkley and the body charged by law with enforcing the Act. Defendant BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION (hereinafter "FCPC") is a commission of appointed Berkeley citizens created by the Act and is charged, among other things, with enforcing the provisions of said Act. Defendants PARTICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER and DAVID B. ROSENTHAL are duly appointed members of the FCPC.

8. Plaintiffs lack information and belief as to the true names and capacities of defendants DOES I through XX and for that reason sue said defendants by fictitious names. Plaintiffs are informed and believe and thereon allege that each of said defendants DOES I through XX have now or will in the future participate in or contribute to endorsement of the Act and cause plaintiffs to be deprived of their constitutional rights as hereinafter set forth.

9. On June 4, 1974, the City of Berkeley by vote of the people enacted the Berkeley Election Reform Act of 1974. The Act to the extent legally enforceable became effective on July 5, 1974; in pertinent part, it reads as follows:

> Sec. 205. "Committee" means any person or combination of persons that directly or indirectly receives contributions which total more than $250 in a calendar year for the purpose of influencing or attempting to influence the action of voters for or against the nomination or election of one or more candidates, or the passage or defeat of any measure, including any committee or subcommittee of a political party.
>
> Sec. 206. "Contribution" means a gift, subscription, loan, advance, deposit, pledge, forgiveness of indebtedness, payment of a debt by a third party, contract, agreement, or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly in aid of or in opposition to the nomination or election of one or more candidates or the qualifications for the ballot or voter approval of one or more measures . . .

Sec. 212. "Expenditure" means a payment, pledge or promise of payment of money or anything of value or other obligation, whether or not legally enforceable, for goods, materials, services or facilities in aid of or in opposition to the nomination or election of one or more candidates or the qualification for the ballot or adoption of one or more measures . . .

Sec. 217. "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Sec. 219. "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

Sec. 602. No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

Sec. 604. If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Sec. 111. If any provision of this ordinance, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this ordinance to the extent it can be given effect, or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby, and to this end the provisions of this ordinance are severable.

10. On April 19, 1977, a general election will be held in the City of Berkeley. Proposition "B" on the April 19th ballot is a proposed amendment to the Berkeley City Charter, imposing "Rent Control." A copy of Proposition "B" is attached hereto as Exhibit "C" and incorporated herein by this reference. If approved (and legally enforceable), this measure would place severe restrictions on the rights of property owners, including plaintiffs herein, to determine proper rental rates for properties which they own and which are located within the Berkeley city limits. Plaintiffs further believe that Proposition "B", if approved, would severely affect and diminish plaintiffs' property rights and the value thereof, and interfere with the conduct of plaintiffs' businesses, and create serious social and economic problems for the City of Berkeley and its citizens as described in greater detail hereafter.

Plaintiffs and each of them desire to maintain control over their aforesaid properties and businesses, prevent the diminution in value thereof and avoid the harmful effects that Proposition "B" would have on Berkeley. For these and other reasons, plaintiffs oppose the passage of Proposition "B."

11. Plaintiffs are informed and believe that supporters of Proposition "B," acting individually and through the Berkeley Housing Coalition Committee, have been and will continue to conduct an active, far-reaching and intensive campaign in support of the ballot measure, including distribution of campaign literature and leaflets throughout the City, sending speakers to public forums and debates, issuance of press releases and statements, and posting numerous signs at a multitude of locations throughout the city.

12. As part of this campaign, supporters of "B" have further made public statements that "B," if approved, would not reduce local property values more than 10 per cent from their present value; and that the Rent Control Board (the composition of which is yet unknown):

(1) Would not establish rental ceilings at such a low level that people from other cities and areas would be drawn to Berkeley by lower rental rates, and

(2) Would exempt certain small scale rental units from the provisions of the law.

Further, proponents of "B" on or about April 1, 1977, began circulating tabloid newspapers containing false and in all likelihood defamatory statements including statements denigrating CARC's campaign manager, Donald Solem, in a manner that is apparently intended to incite voters to vote against "B."

Plaintiffs are informed and believe and thereon allege that all aforementioned statements are untrue, unfair or misleading because:

(1) Property values would decrease more than 10 per cent;

(2) It is not yet possible to ascertain the future actions and policies of a Rent Control Board which is not yet constituted and whose members are not yet known; and

(3) CARC's campaign manager was not associated with certain prior campaigns rejected by the Berkeley voters.

13. CARC has conducted studies of the effects of rent control in other jurisdictions, and has researched numerous issues to discover the potential and likely effect that the approval of measure "B" will have on the City itself and its citizens.

Plaintiffs believe it is necessary to inform the electorate in the City of Berkeley of the misleading information distributed by the proponents of "B" and to inform them of the results of plaintiffs' own studies and investigations.

Plaintiffs further believe that proponents of Proposition "B" have inaccurately communicated to the voters the effects of the measure; plaintiffs have carefully studied Proposition "B" and wish to inform the public of the results of those studies. It is necessary for the voters of Berkeley, in the fullest and freest manner possible, to hear all such information and not merely proponents' arguments so that voters are able to cast an informed ballot in the April 19, 1977 election. (See Declaration of CARC's campaign manager as Exhibit I and incorporated herein by this reference).

14. Plaintiffs Mason McDuffie, Berkeley Board of Realtors, Betty Gertiz, Muriel Rosenkranz and Eva Floystrup and others, including those whose declarations are attached to this

complaint as Exhibits J, K, L, M and N have determined that the best and most efficient means of getting this information to the electorate is to band together their resources to conduct research and studies, to obtain data on rent control from other jurisdictions where it has been enacted, primarily in East Coast municipalities of the United States, to conduct opinion polls, to prepare and disseminate this information through the help of volunteer workers and the mails, and to refute information believed to be untrue and misleading circulated by the proponents. Because Proposition "B" is so complex, plaintiffs believe that extensive written explanations are vital to fully inform the voters.

Plaintiffs can only coordinate these resources by pooling all financial contributions. Plaintiffs Mason McDuffie and Berkeley Board of Realtors have contributed sums to CARC as previously set forth to accomplish this purpose.

15. An actual controversy has arisen between plaintiffs and defendants affecting their legal rights and duties under the Act. Defendants contend that under the terms of the Act, CARC is absolutely prohibited from accepting more than $250 from a single person or entity, from entities having many members or even from investor groups whereby any member's or investor's pro rata share of the contribution is substantially below $250.

16. CARC is an unincorporated association, which can act only by and through its agents, officers, supporters and employees. As with all businesses, it must pay persons in its employment and must pay for the cost of preparing materials and presenting information about Proposition "B" to voters in mailings, handbills, advertisements, other writings, debates, discussions, meetings and other media of communication. The Act's limitation of $250 on the amounts which can be contributed and thereafter spent, cannot reasonably be applied to CARC and its supporters in their attempt to protect their businesses and property, or to the individual plaintiffs herein.

Plaintiffs contend that the Act was not intended to prevent plaintiffs from making reasonable and necessary expenditures to communicate by written instruments to the voters of Berkeley on a measure admitted by its proponents to diminish the value and control of plaintiffs' businesses and properties.

17. In the alternative, however, plaintiffs contend that if said Act is construed and enforced as urged by defendants, plaintiffs' constitutional rights to participate effectively in an election campaign in which the issue is plaintiffs' rights to exercise control over and maintain the values of their properties would be gravely impaired. Plaintiffs contend that such interference is invalid as an infringement upon plaintiffs' constitutional rights of free speech, right to petition and freedom of association.

The limitation on contributions by other persons and entities to CARC is an infringement upon the contributors' constitutional rights and injures plaintiff CARC to the extent it curtails their association with CARC for the purpose of informing Berkeley residents about Proposition "B."

Defendants dispute plaintiffs' contentions and urge that said ordinance, as so construed by defendants, is constitutional and valid.

18. Plaintiffs desire a declaration of their rights under the Berkeley Election Reform Act of 1974.

19. The threatened application of the Berkeley Election Reform Act of 1974 to plaintiffs, as construed by defendants, interferes with, threatens, and impairs rights and privileges of plaintiff in the following manner:

A. By prohibiting plaintiffs, Mason McDuffie and Berkeley Board of Realtors, as well as all other similarly inclined from contributing more than $250 to a committee "with respect to" a ballot measure, in derogation of plaintiffs' rights of free expression as set forth in the First Amendment and the United States Constitution and Article 1 Section 9 of the California Constitution.

B. By wording so vague on the face of the Act that plaintiffs are unable to ascertain the true meaning of Section 602 thereof, concerning the meaning of the words "contribution" and "with respect to" a ballot measure, and particularly the meaning of the words "DO NOT ENFORCE" as they appear in the margin of the text adjacent to Section 602 (See Exhibit A).

C. By fixing unreasonably low limits on the amount of monies individual plaintiffs, including organizations with thousands of members, can contribute to CARC and the monies CARC can accept from individual contributors, so that the rights of all plaintiffs to communicate their views on Proposition "B" are unreasonably restricted without relation to any compelling state interest therefor.

D. By impermissibly restricting individual plaintiffs' rights to associate with one another as a single group or entity to oppose the passage of a ballot measure by contributing as a group in excess of $250 to any committee sharing their views.

E. By indirectly placing a limit on the total amount of funds CARC can spend in opposing "B" and thereby violating CARC's rights to freedom of expression.

WHEREFORE, plaintiffs pray for judgment as hereinafter specified.

SECOND CAUSE OF ACTION

INJUNCTION

1. Plaintiffs allege and incorporate herein by reference each and every allegation contained in the First Cause of Action.

2. Plaintiffs are in danger of suffering irreparable harm because of defendants' interpretation of the Election Reform Act of 1974 and defendants' enforcement of the Act.

3. Plaintiffs must have the opportunity immediately to participate in public discussion on the comparative merits of Proposition "B." That measure involves complex questions of the effect of "B" on property values, the flow of non-residents into the City, and related matters and plaintiffs will need virtually every day between now and April 19, 1977 to conduct their dissemination of information program. Any delay irreparably injures plaintiffs' positions in the campaign.

THIRD CAUSE OF ACTION

VAGUENESS; DETRIMENTAL RELIANCE; DUE PROCESS; INJUNCTION

1. Plaintiffs allege and incorporate herein by reference each and every allegation contained in the First Cause of Action.

2. On or about December 1, 1976, the office of the City Clerk of Berkeley publicly distributed to CARC (and others) copies of the text of the Act, for reference and use by CARC during its preparations for the April 19, 1977, election. In the margin of the text, immediately next to Section 602, appeared the words "DO NOT ENFORCE." (See Exhibit A attached hereto and incorporated herein by this reference). These words were annotated on the text by the Berkeley City Attorney, apparently in recognition of recent United States and California Supreme and Appellate Court decisions that placed the validity of Section 602 in considerable question.

3. On or about December 17, 1976, CARC's attorneys requested an advisory opinion from the FCPC to determine the FCPC's position on the enforceability of Section 602. (See Exhibit D attached hereto and incorporated herein by this reference). CARC believed Section 602 was unconstitutional but had decided for political reasons to abide by any ruling of the FCPC.

4. On or about January 12, 1977, at a duly-noticed public meeting of the FCPC, CARC's campaign director, coordinator and legal counsel were advised by the FCPC that it believed Section 602 was valid and enforceable; however, at least partially because of the recommendation of the Berkeley City Attorney (See last paragraph of Memorandum of City Attorney attached hereto as Exhibit "E" and incorporated herein by this reference) and with a view to treat fairly those who had relied on the pre-December, 1976 annotated version of the Act which indicated Section 602 would not be enforced, the FCPC publicly stated that Section 602 would be enforced only prospectively from the day on which the City distributed new

annotated texts of the Act without the words "DO NOT ENFORCE" next to Section 602. Such texts were publicly distributed on January 24, 1971 (See Exhibit "B" attached hereto and incorporated herein by this reference). [Exhibit B is included as Appendix F in the Appendix to Jurisdictional Statement]

5. Prior to January 24, 1971, and in reliance both upon the December 1, 1976 distribution of texts of the Act with the words "DO NOT ENFORCE" appearing beside Section 602 and the January 12, 1977 statements by the FCPC that enforcement of Section 602 would be effective only upon the distribution of new texts, CARC accepted contributions in excess of $250 from numerous contributors, totalling approximately $18,600. (See Declaration of Donald Solem, Marisa Samuels and Peter Bagatelos as Exhibit "F" attached hereto and incorporated herein by this reference). The FCPC never responded in writing to CARC's legal counsel as required by Section 310 of the Act, nor furnished CARC's legal counsel with minutes of the January 12, 1977 meeting. CARC would not have accepted such contributions if it had any doubt of the FCPC's January 12, 1977 ruling as previously set forth.

Plaintiffs Mason McDuffie and Berkeley Board of Realtors made contributions in excess of $250 to CARC prior to January 24, 1977. See Declaration of Mason McDuffie (Exhibit "G" and Berkeley Board of Realtors Exhibit "H").

6. On or about March 30, 1977, the FCPC reversed its position and determined at a duly-noticed and convened meeting that the receipt of contributions larger than $250 by CARC after January 12, 1977 and prior to January 24, 1977 violated Section 602 of the Act. The FCPC rejected CARC's view that the monies had been collected in good faith (for the reasons stated above herein) and rejected CARC's request that to avoid being held in violation of the Act the excess funds over $250 be returned to the contributors who donated them in good faith. FCPC ordered CARC to forfeit the $18,600 to the City in accord with Section 604 of the Act.

Plaintiff CARC urgently needs to use these funds to communicate with the electorate concerning Proposition B before the April 19, 1977 election.

7. The aforementioned forfeiture of the $18,600 in campaign contributions violates plaintiffs' rights in that:

(a) The imprinting of the words "DO NOT ENFORCE" beside Section 602 and subsequent distribution of such texts of the Act, renders Section 602 vague, ambiguous and not susceptible of comprehension by reasonable persons; accordingly, the enforcement of that provision of the Act for contributions made to CARC prior to January 24, 1977 is violative of plaintiffs' rights to Due Process of Law;

(b) The FCPC's application of Section 602 to CARC was arbitrary and capricious and deprived CARC of Due Process of Law, in that defendant FCPC led CARC to believe that Section 602 would be enforced only prospectively from January 24, 1977 and in reliance thereon CARC received the aforementioned $18,600 prior to January 24, 1977; but on March 30, 1977, the Commission without justification adopted a policy to enforce Section 602 from January 12, 1977;

(c) CARC detrimentally and in good faith relied in collecting such contributions from individual plaintiffs and others, on representations of the City, the FCPC and the City Attorney that Section 602 would not be enforced prior to January 24, 1977, and equity demands that CARC not be punished therefor;

(d) The attempted forfeiture stems from the alleged violation of a provision (Section 602) of the Act which is unconstitutional on its face; a fortiori, due process dictates that no penalty can be imposed for "violation" of an invalid law;

(e) The penalty provision (Section 604) of the Act is unreasonable by not only depriving CARC of funds three weeks before the election but also refusing to allow such funds to be returned to the contributors thereof.

8. Plaintiffs are in danger of suffering irreparable harm because of defendants' attempt to enforce Sections 602 and 604 of the Act by requiring CARC to forfeit $18,600 in badly-needed campaign funds only two weeks before the election.

9. Plaintiffs must have the opportunity to participate immediately in public discussion of the comparative merits of Proposition "B." The measure poses complex questions of present and future importance to the City of Berkeley and CARC will need every day between now and April 19 to conduct its program of disseminating information, and in doing

so will need the full and unrestricted use of the campaign funds previously described. Any delay irreparably injures plaintiffs' position in the campaign.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For a declaratory judgment declaring that Section 602 of the Berkeley Election Reform Act of 1974 is unconstitutional, invalid and void;

2. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

3. For preliminary and permanent injunctions enjoining defendants, and each of them, and their agents, servants and employees, and all persons acting under, in concert with, or for them, from enforcing or attempting to enforce, against plaintiffs, Section 602 of the Berkeley Election Reform Act of 1974 and any and all contribution limits or restrictions contained therein;

4. For preliminary and permanent injunctions enjoining defendants, and each of them, and their agents, servants and employees, and all persons acting under, in concert with, or for them, from enforcing or attempting to enforce Section 604 of the Berkeley Election Reform Act of 1974 to require plaintiff Committee (CARC) to pay into the Berkeley General Fund the aforementioned campaign contributions approximately $18,600 in amount;

5. For costs of suit;

6. For such other and further relief as the Court deems just and proper.

Dated: April 6, 1977

DOBBS, DOYLE & NIELSEN

By VIGO G. NIELSEN, JR.

Vigo G. Nielsen, Jr.
Attorneys for Plaintiffs

VERIFICATION

I am the Campaign Manager for plaintiff CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING (CARC) in the above entitled action; I have read the foregoing COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are herein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 1977 at San Francisco, California.
(date) (place)

DONALD SOLEM

Donald Solem

APPENDIX A

SURVEY OF SPENDING IN STATEWIDE INITIATIVE CAMPAIGNS 1954—1974

This survey was compiled by California Research, a Sacramento research firm, from the official campaign reports filed in the Secretary of State's office.

The side expending the most money won in 50% of the initiative campaigns.

Op.	Description	Results	Actual Spending: For	Actual Spending: Against	Highest Spender
1954 General Election					
4	Aid to needy aged	Failed (55%)	$ 134,928	$ 218,032	Won
1956 General Election					
4	Oil and gas conservation	Failed (77%)	$3,450,211	$1,428,056	Lost
1958 General Election					
16	Abolishing tax exemption for religious school property	Failed (67%)	$ 499,188	$1,340,817	Won
17	Changing sales and income tax rates	Failed (82%)	—0—	$ 813,965	Won
18	"Right to work."	Failed (60%)	$ 892,862	$2,316,200	Won
1960 General Election					
15	Reapportion Senate	Failed (64%)	$ 241,852	$ 334,468	Won
1962 General Election					
22	Osteopath	Adopted (69%)	$ 275,525	$ 66,839	Won
23	Initiative Reapportion Senate	Failed (53%)	$ 136,888	$ 243,975	Won
24	Declaring subversive activities illegal	Failed (60%)	$ 104,074	$ 12,985	Lost

Op.	Description	Results	Actual Spending: For	Actual Spending: Against	Highest Spender
1964 General Election					
14	Repeal "Rumford Act"	Adopted (65%)	$ 660,940	$1,174,056	Lost
15	Prohibiting pay t.v.	Adopted (66%)	$ 878,506	$ 198,191	Won
16	Statewide lottery	Failed (70%)	$ 549,884	$ 46,245	Lost
17	Eliminate "featherbedding" on railroad train crews	Adopted (60%)	$1,934,786	$ 925,827	Won
1968 General Election					
	Limiting ad valorem property tax	Failed (68%)	$ 230,908	$1,024,392	Won
1970 Primary Election					
8	Reducing property tax	Failed (72%)	$1,082,175	$ 325,212	Lost
1972 Primary Election					
9	Environment	Failed (65%)	$ 228,233	$1,381,199	Won
1972 General Election					
14	Limiting taxes	Failed (67%)	$1,277,803	$ 776,487	Lost
15	Establish state employee salaries at prevailing rates	Failed (67%)	$1,781,687	$ 22,537	Lost
16	Procedure for setting salaries of highway patrol	Failed (67%)	$ 379,445	$ —0—	Lost
	Death penalty	Adopted (67%)	$ 44,224	$ 60,068	Lost
18	Obscenity initiative	Failed (68%)	$ 162,899	$ 877,256	Won
19	Legalizing marijuana	Failed (66%)	$ 191,619	$ 4,995	Lost

Op.	Description	Results	Actual Spending: For	Actual Spending: Against	Highest Spender
20	Coastal initiative	Adopted (55%)	$ 294,786	$1,156,583	Lost
21	Prohibit busing	Adopted (63%)	$ 42,683	$ 12,917	Won
22	Agricultural labor	Failed (58%)	$ 956,137	$ 229,281	Lost
1973 Special Election					
1	Tax limitation	Failed (54%)	$2,018,527	$ 926,601	Lost
1974 Primary Election					
9	Political reform	Adopted (70%)	$ 608,658	$ 201,879	Won
1974 General Election					
17	Wild and scenic rivers	Failed (53%)	$ 447,497	$ 247,258	Lost
					Won 14
					Lost 14

EXHIBIT D

DOBBS, DOYLE & NIELSEN
Attorneys and Counselors at Law
SUITE 2500, THE ALCOA BUILDING
ONE MARITIME PLAZA
SAN FRANCISCO, CA 94111
TELEPHONE (415) 362-1940

December 17, 1976

Berkeley Fair Campaign Practices Commission
Ms. Patricia DeVito
c/o City Clerk's Office
City Hall
Berkeley, California

Dear Ms. DeVito and Commissioners:

After careful review of the Berkeley Election Reform Act of 1974, revised to November 5, 1974 and annotated August, 1976, and after several telephone discussions with various Berkeley governmental officials, I am unclear as to the status of Section 602 of Ordinance No. 4700—N.S., known as the Berkeley Election Reform Act of 1974.

The annotation beside Section 602 in the copy which I have states "Do Not Enforce." This section sets a limitation of $250 on those persons who wish to make political contributions in support of or in opposition to a measure. I have been requested by my clients as to whether that section is still valid in light of the annotation.

I hereby request your advisory opinion on behalf of my clients, therefore, as to whether any contributions exceeding $250 which might be made to campaign committees which intend to support or oppose ballot measures can be retained under present Berkeley law or, if not, whether the entire amount of such contributions must be returned to the donors or merely those portions which exceed $250 in each case.

Assistant City Attorney Dennis Wheat advised me by telephone on December 17, 1976 that City Attorney Michael Lawson had apprised him that Section 602 will not be enforced and therefore there are no contribution limitations at all. As requested, I would appreciate your confirmation or denial of this information.

Thank you very much for your cooperation in this matter.

I look forward to receiving your reply, presumably within a 14-day period specified in the ordinance for reply to such opinion request.

Yours very truly,

PETER A. BAGATELOS

Peter A. Bagatelos

PAB:aeo

RECEIVED

January 12, 1977
OFFICE OF CITY CLERK

EXHIBIT E

January 12, 1977

TO EDYTHE CAMPBELL, CITY CLERK & SECRETARY TO THE FAIR CAMPAIGN PRACTICES COMMISSION

FROM MICHAEL LAWSON, CITY ATTORNEY

SUBJECT: BERKELEY ELECTION REFORM ACT—

(Ordinance No. 4700-N.S.)

At your request I have reviewed the Berkeley Election Reform Act (Ordinance No. 4700-N.S.) in its entirety.

I have also reviewed a number of inquiries directed at the City Clerk and the Fair Campaign Practices Commission by Peter Bagatelos, an attorney representing individuals concerned with the enforcement of Ordinance 4700.

The purpose of this memorandum is to respond to the specific inquiries of Mr. Bagatelos.

1. One of his inquiries dealt with the enforceability of Section 602, which section limits campaign contributions to $250. Section 602 provides,

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250.00)."

Recent decisions of the United States Supreme Court and the California Supreme Court clearly prohibit limitations on campaign expenditures; however, it is less clear whether campaign contributions with respect to candidates or measures can be regulated. In the most thorough analysis of these two problem areas, the U.S. Supreme Court in *Buckley v. Valeo* (1976) 424 U.S. 1, 46 L.Ed. 2d 659, invalidated portions of the

Federal Election Campaign Act of 1971 respecting limitations on campaign expenditures but left intact restrictions on contributions made by individuals or committees. Based upon the distinction made by the Court between expenditures and contributions, I am of the opinion that Section 602 of the Berkeley Election Reform Act is valid and enforceable. In my judgment Section 602 would meet the test established in *Buckley* which requires that the State show a "compelling interest" subject to the strictest scrutiny.

Because individuals and committees have relied on the annotated version of Ordinance 4700 disseminated by the City Clerk's office, which indicates that Section 602 would not be enforced, I believe that in all fairness enforcement of Section 602 should be prospective in nature, that is to say that contributions made to or received by individuals or committees should not be penalized for relying on the annotated ordinance disseminated by the City Clerk and initially approved by the City Attorney.

2. A second inquiry of Mr. Bagatelos was directed at Sections 412 and 603 of the Berkeley Election Reform Act. My reading of these sections would allow, pursuant to Section 603, the first $1500 raised in contributions of $50 or less to be exempt from disclosure. Contributions of $50 or less received after the first $1500 are not subject to the exemption of Section 412 for contributions of less than $50. In my opinion the first $1500 may include "anonymous" contributions, not exceeding $50, as well as "known" contributions not exceeding $50, or said $1500 may be made up entirely of anonymous contributions not exceeding $50 or may be made up entirely of known contributions not exceeding $50. Upon reaching the initial $1500, contributions received thereafter, whether under $50 or over $50, would require disclosure of the name, address, employer and occupation.

Attached hereto you will find the four communications of Mr. Bagetelos, dated January 6, 1977; January 4, 1977; December 17, 1976; and December 17, 1976.

MICHAEL LAWSON

Michael Lawson
City Attorney

ML:jh

Attachments

EXHIBIT F

DECLARATION RE: JANUARY 12, 1977 COMMISSION DECISION

We, Donald Solem, Marisa Samuels, and Peter A. Bagatelos, certify:

1) Donald Solem is campaign manager of the Citizens Against Rent Control (CARC), a committee, registered with the City Clerk of Berkeley, to oppose Proposition B on the April 19, 1977 ballot.

2) Marisa Samuels is campaign coordinator of CARC.

3) Peter A. Bagatelos is legal counsel for CARC.

4) In December, 1976 CARC legal counsel requested the Berkeley Fair Campaign Practices Commission (FCPC) to confirm non-enforceability of Section 602 of Berkeley Ordinance 4700-N.S. (Act), so that CARC would comply with the FCPC's interpretation of Section 602, even though CARC believed Section 602 was unconstitutional.

5) On January 12, 1977, the FCPC met for a publicly noticed and scheduled meeting to consider the enforceability of Section 602.

6) We three attended the January 12, 1977 meeting of the FCPC. CARC legal counsel participated in lengthy discussion with regard to the validity and enforceability of Section 602. Legal counsel indicated to the FCPC opinions that Section 602 was invalid.

7) City Attorney of Berkeley, Michael Lawson, had presented a memorandum arguing that Section 602 was enforceable, but recommended that because individuals and committees had relied on the publicy circulated annotated version of Ordinance 4700, which indicated that Section 602 would not be enforced, in all fairness enforcement of Section 602 should be prospective only.

8) FCPC adopted the City Attorney's position on validity and enforceability. We heard the FCPC also accept the City Attorney's recommendation for prospective application only.

9) CARC legal counsel reminded the Commission that committees would continue to rely on the annotated ordinance, indicating non-enforceability, until notified to the contrary.

The City Clerk had indicated that the City Attorney was completing a review of the annotations and that the new annotated ordinance would be available by the following week. We heard the Commission decide that prospective application of Section 602 would commence on the date a newly issued annotated ordinance, not bearing any annotation beside Section 602, was available for public distribution. The new annotated ordinance was made available to the public on January 24, 1977.

10) CARC relied upon this decision and accepted contributions of $250 only until January 20, 1977.

11) We are willing individually to be questioned with regard to these matters and to have our responses recorded with a polygraph instrument.

We declare under penalty of perjury that the foregoing is true and correct to the best of our knowledge and belief.

DATED: April 5, 1977 — /s/ DONALD SOLEM
Donald Solem

DATED: April 5, 1977 — /s/ MARISSA SAMUELS
Marissa Samuels

DATED: April 5, 1977 — /s/ PETER A. BAGATELOS
Peter A. Bagatelos

EXHIBIT G

DECLARATION

I, M. R. Griffin, certify:

(1) I am a Partner of Mason-McDuffie Co.

(2) Mason-McDuffie Co. has been active in the real estate business in Berkeley since 1887. It sells, exchanges, rents, manages, insures and finances real property in Berkeley and other areas in California. It owns real property in Berkeley and employs several hundred persons at its main office in Berkeley.

(3) This company has long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly affect the housing and rental estate investment industry in the City of Berkeley in particular and the entire State in general.

(4) A measure relative to rent control has been placed on the Berkeley City ballot (see Exhibit C to the Complaint); the election to be held on April 19, 1977. If this measure is approved by the voters, we believe that other municipalities in California will attempt to also enact similar legislation.

(5) Based upon our experience in this field, we believe that the implementation of rent control measures in California will curtail housing availability, eliminate many rental units which will be sold by owners for non rental purposes, reduce maintenance of existing units, diminish the tax base due to declining values based on reduced net income of rent property, and produce other administrative and socially undesireable effects.

(6) We have studied the effects of rent control measures in other jurisdictions and thereby have obtained information which we feel must be made available to the electorate prior to election date, so that a knowledgeable and informed decision of this issue will be reached.

(7) This company determined that an effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to Citizens Against Rental Control (CARC), a committee, registered with the Berkeley City Clerk's office, organized to oppose the rent control measure.

(8) We attempted in December of 1976 to make a contribution to CARC in an amount over $250 since Berkeley is a large city and considerable funds will be needed to adequately communicate this factual information. CARC advised us that the language in the Berkeley Election Reform Act of 1974 appeared to prohibit contributions in excess of $250, but that it appeared that the Berkeley City Attorney was not enforcing the limitation in recognition of its vulnerability to Constitutional attack set forth in recent U.S. and California Supreme and Appellate Court decisions.

(9) Although we were willing to make a contribution in excess of $250 at that time on the assurance that the City did not believe Section 602 was enforceable, CARC asked that we withhold it until the Berkeley Fair Campaign Practices Commission confirmed the unenforceability of Section 602. We complied with this request.

(10) On or about January 13, 1977, this Company was advised that the Berkeley Fair Campaign Practices Commission met on January 12, 1977 and at that time advised CARC's campaign manager and legal counsel that in the Commission's opinion, Section 602 was valid and enforceable, but that fairness dictated that Section 602 was enforced only prospectively from when copies of a new annotated act were made available to the public.

(11) Relying upon what we believed to be the Commission's statement of January 12, 1977, and since we would have already made a contribution except for the caution of CARC, this company contributed $1,000 to CARC on January 17, 1977. Copies of the new annotated act were made public on January 24, 1977.

(12) We feel that Section 602 violates our rights to express freely our views on the issue of rent control, an issue that directly affects us and thereby needlessly limits free and open public debate on a subject of obvious public importance.

(13) We are further confused as to the meaning of Section 602 of the Berkeley Campaign Ordinance, and particularly as to which acts are permitted and which are proscribed. The limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our views in supplementation to those of CARC. It is our belief that such a restriction impermissibly violates our First Amendment rights to freedom of speech and expression.

DECLARATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: April 1, 1977.

M. R. GRIFFIN

Title: *Partner*

EXHIBIT H

Berkeley Board of Realtors

1553 GROVE ST. • BERKELEY, CALIFORNIA 94709 • POST OFFICE BOX 1224, BERKELEY, CALIFORNIA 94701

DECLARATION

I, Victor Stachura, certify:

1) I am President of the Berkeley Board of Realtors.

2) Members of this Berkeley Board of Realtors include many Realtors (Brokers) and Realtor-Associates (Salesmen) who conduct business in the City of Berkeley.

3) This Board has long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly effect the housing and real estate investment industry in the City of Berkeley in particular, and the entire state in general.

4) A measure relative to rent control has been placed on the Berkeley city ballot (see exhibit C to the Complaint); the election will be held on April 19, 1977. If this measure is approved by the voters, we believe that other municipalities in California will attempt to also enact similar legislation.

5) Based upon our experience and study in this field, we believe that the implementation of rent control measures in California will curtail housing availability, eliminate many rental units which will be sold by owners for non-rental purposes, lower maintenance of existing units, diminish the tax base due to declining values based on reduced net income of rental property, and produce other administrative and socially undesirable effects. Because of the facts stated above, the Directors of the Berkeley Board

of Realtors felt a monetary contribution from Board funds was in order; I am told that some individual offices and/or members are also contributing.

6) We have studied the effects of rent control measures in other jurisdictions and have thereby obtained information which we feel must be made available to the electorate prior to election day, so a knowledgeable and informed decision on this issue will be reached.

7) This Board determined that the most effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to Coalition For Fair Housing (later named Citizens Against Rent Control and referred to hereinafter as C.A.R.C.), a committee registered with the Berkeley City Clerk's office, organized to oppose the rent control measure.

8) We attempted in December of 1976 to make a contribution to C.A.R.C. in an amount over $250.00 since Berkeley is a large city and considerable funds will be needed to adequately communicate this factual information. Spokesmen for C.A.R.C. advised us that the language in the Berkeley election reform act of 1974 appeared to prohibit contributions in excess of $250.00, but that it appeared that the Berkeley city attorney was not enforcing the limitation in recognition of its vulnerability to constitutional attack set forth in recent U.S. and California Supreme and Appellate Court decisions.

9) Although we were willing to make a contribution in excess of $250.00 at that time on the assurance that the city did not believe section 602 was enforceable, C.A.R.C. asked that we withhold it until the Berkeley Fair Campaign Practices Commission confirmed the unenforceability of Section 602. We complied with this request.

10) On or about January 13, 1977, this Board was advised that the Berkeley Fair Campaign Commission met on January 12, 1977, and at that time advised C.A.R.C.'s campaign manager and legal counsel that in the commission's opinion Section 602 was valid and enforceable, but

that fairness dictated that Section 602 be enforced only prospectively from when copies of a new annotated Act were made available to the public.

11) Relying upon what we were told and believed to be the commission's statement of January 12, 1977, and since we would have already made a contribution except for the caution of C.A.R.C. this association contributed $5,000.00 to C.A.R.C. on January 14, 1977. We were informed that copies of the new annotated Act were made public on January 24, 1977.

12) We feel that Section 602 violates our rights to express freely our views on the issue of rent control, an issue that directly effects us (our members) and thereby needlessly limits free and open public debate on an issue of obvious public importance.

13) We are further confused as to the meaning of Section 602 of the Berkeley Campaign Ordinance, and particularly as to which acts are permitted and which acts are proscribed. The limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our views in supplementation to those of C.A.R.C. It is our belief that such a restriction inpermissively violates our first amendment rights to freedom of speech and expression.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: April 4, 1977

VICTOR F. STACHURA

President

EXHIBIT I

DECLARATION OF CAMPAIGN MANAGER

I, DONALD L. SOLEM, declare:

1. I am the owner of Solem and Associates, a Bay Area based firm which among other things, specializes in the management of political campaigns, including ballot measure propositions.

2. As a firm I handled the Northern California campaigns for Proposition 2 (the Coastal Park and Recreation Bond Act) and Proposition 5 (the Interest Rate Limitation Measure (November, 1976)).

Prior to the formation of the above-named firm, I served as Northern California campaign co-ordinator for Citizens for Jobs and Energy (the No on 15 Committee), June, 1976, served for five years as administrative assistant to State Senate Majority Leader George Moscone in San Francisco and Sacramento, and served as executive secretary to the Democratic State Central Committee (2 years). Prior to that I managed or co-ordinated Bay Area campaigns for Supervisor, Assessor, City Council, School Board, Congress, State Senate (now Congressman George Miller), Assembly (Ken Meade and now Secretary of State March Fong Eu).

I have also served as a campaign consultant to the Democratic National Committee (1974) and have been active in positions of leadership in volunteer Democratic political groups from 1961 to date (Democratic Clubs, County Central Committees, Young Democrats, etc.).

3. The firm of Solem and Associates is serving as campaign manager for Citizens Against Rent Control/Coalition For Fair Housing/No on Proposition B (CARC), a committee, registered with the City Clerk of Berkeley, to oppose the proposed charter amendment to institute rent controls in Berkeley, which measure has qualified for the April 19, 1977 ballot.

4. I have personally participated in all aspects of our campaign against this initiative measure. I am fully familiar with the manner in which our campaign has been conducted thus far and our plans for the last three weeks of this campaign.

5. I am familiar with the costs of mailing communication to all registered voters in Berkeley, the costs of newspaper advertisements and other forms of communication in political campaigns in localities the size of Berkeley and specifically the current costs of operating the "No on B" headquarters and the key volunteer staff of approximately 25 persons. A citywide mailing to each of the 71,088 registered voters in Berkeley costs approximately $12,800.

6. CARC is a broad-based volunteer organization. So far there have been approximately 750 volunteers assisting the campaign's efforts to disseminate factual information on the economic and social consequences of enacting Proposition B.

The campaign is led by 5 volunteer co-chairpersons and by a Supporters' Committee of over 125 persons, some of whose names appear on our correspondence, as indicated by the attachment to this declaration.

7. The effect of rent control is very serious upon persons who own property, manage property, are tenants or are otherwise involved in the community in Berkeley. Over 1,300 different contributors have already made contributions, which contributions have been fully disclosed on campaign statements filed on January 31 and March 15, 1977. Over 6 dozen persons have directly contacted me and members of my staff, expressing a willingness to assist in our education effort, but expressing a lack of time or of experience with campaign management.

These persons can only assist our educational process by making financial contributions to a committee experienced in ballot measures which has thoroughly researched the issues of rent control, such as CARC.

8. In a separate declaration, I have stated that I personally heard the Berkeley Fair Campaign Practices Commission (Commission) on January 12, 1977 allow contributions in excess of $250 prior to a new publication of the Berkeley Campaign Ordinance which did not annotate the contribution limitation (§602) as unenforceable. The attorneys for the proponents of the rent control ordinance acknowledge that they received agendas of the Commission's meetings. However, they failed to attend the January 12, 1977 meeting.

We had previously been in contact with at least a half dozen persons wishing to communicate to Berkeley citizens their opposition arguments to Proposition B by contributing to CARC in excess of $250. I had informed these people that we planned to only take contributions that were acceptable to the Berkeley Fair Campaign Practices Commission, even though we believed that any limitations would be an unconstitutional restraint on free communication of facts.

After the Commission's January 12, 1977 meeting, we contacted these contributors and before the new version of the Ordinance was published, our campaign received contributions of $18,600 in excess of $250.

9. CARC raised approximately $108,000 between December and March. The committee discontinued all major fundraising efforts in mid-March and adopted a budget which included the expenditure of the $18,600. The Commission ruled on March 30, 1977 that the $18,600 was accepted in violation of the Ordinance and must be promptly remitted to the City Auditor.

10. The issues raised by the Rent Control Initiative are extremely complex. Not only is it an emotional issue, it will have substantial economic impact on apartment owners, renters, property owners and businesses within Berkeley and will substantially decrease the supply of available housing for all Berkeleyans. Because renter's income will be a factor in setting rents, the poor, students, the elderly and those generally with low incomes will be displaced by wealthier renters. Repairs and maintenance

on Berkeley's already old housing will suffer under rent control. And, finally, the adoption of rent control will foreclose other constructive steps which can be taken to meet Berkeley's housing shortage.

The proposed initiative is poorly worded and does not accomplish the alleged goals of the initiative.

11. The proponents of the Rent Control Ordinance have announced that they have large numbers of volunteers to circulate materials and that this initiative is part of a statewide coalition to secure rent control in many California communities. The proponents have acknowledged that the press in Berkeley is receptive to disseminate arguments on behalf of the rent control proposal. The proponents know that the Commission advocates contribution and expenditure limitations and that considerable publicity, negative to CARC, results from charging CARC with campaign violations. The proponents know that CARC is being required to divert campaign resources to defend these charges before the Commission and to seek judicial approval to spend these funds. Such tactics are deliberate attempts to reduce CARC's ability to communicate information to Berkeley voters.

12. I am familiar with studies that have been made on the expenditures for statewide initiative campaigns. Those of which I am aware demonstrate that large expenditures of money do not correlate with winning an election.

The expenditure of monies on an initiative campaign only increases the ability to communicate facts more freely to voters prior to the election.

13. It is my opinion and that of CARC that CARC must continue to present comprehensive economic, technical and statistical data to the voters on the effects of Proposition B. Many of these issues should, in my opinion, be treated and discussed separately, in separate communications. The communication of such information is costly and must be done before April 13, 1977, to have any effect on the April 19, 1977 election. If the Commission

denies the committee's use of $18,600, the Committee's present remaining funds are insufficient to communicate this information to Berkeley voters.

The foregoing statements are made up of my own personal knowledge and are true and correct, except for those which are stated to be my opinion.

Executed in Berkeley, California on the 5th of April, 1977.

DONALD SOLEM

Donald Solem

EXHIBIT J

DECLARATION

I, Zan L. Beckstead, certify:

1. I am the Executive Vice President and chief operating officer of the California Association of Realtors®, a Statewide California non-profit corporation.

2. There are approximately 100,000 members of our Association in the State of California including approximately 450 Realtors® who are residents or who conduct their business and use rental property in the City of Berkeley.

3. CAR has long studied the issue of rent control and has opposed unreasonable ordinances when they adversely affect the housing and real estate industry.

4. CAR has studied the Berkeley proposed Measure B, which if enacted will create a system of rent control in Berkeley. CAR has determined that the proposed measure is not in the best interest of our membership, the citizens of Berkeley and the people of California. We believe it will adversely curtail housing availability and the standards of construction and maintenance of rental units in Berkeley.

5. Our membership believes that the citizens of Berkeley should be made aware of the implications of this new ballot measure. Our membership believes we can best assist the dissemination of information by contributing from our members funds to the organized opposition campaign located in Berkeley, which contributions will be part of a coordinated education effort.

6. CAR informed the citizens against rent control, the committee opposing the rent control initiative in December that we were interested in making a contribution of $5,000. Citizens Against Rent Control informed us that there was some legal confusion about the Berkeley campaign ordinances but they were attempting to resolve that confusion.

7. On or about January 13, 1977, our legal counsel, who specializes in political law, informed us that contributions in excess of $250 were legal until such time as the City of Berkeley revised its campaign ordinance which stated that the contribution limitation was unenforceable. On January 14, 1977, CAR made a contribution to Citizens for Rent Control in the sum of $5,000 which is approximately $11 per membership.

8. CAR believes that our members and other voters in Berkeley are unduly restricted if these monies cannot be spent to freely and convincingly express our position on Proposition B.

I declare, under penalty of perjury, that the following is true and correct to the best of my knowledge and belief.

April 1, 1977

CALIFORNIA ASSOCIATION OF REALTORS®

ZAN L. BECKSTEAD

Zan L. Beckstead
Executive Vice President

ZLB:mt

EXHIBIT K

DECLARATION

(1) I am the Vice Chairman of the Apartment Political Action Committee.

(2) Members of this association include many apartment owners who conduct business and own rental property in the city of Berkeley.

(3) This association has long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly effect the housing and real estate investment industry in the city of Berkeley in particular, and the entire state in general.

(4) A measure relating to rent control has been placed on the Berkeley city ballot (see exhibit "C" to the complaint); the election will be held on April 19, 1977. If this measure is approved by the voters, we believe that other municipalities in California will attempt to also enact similar legislation.

(5) Based on our experience in this field, we believe that the implementation of rent control measures in California will curtail housing availability, eliminate many rental units which will be sold by owners for non rental purposes, lower maintenance of existing units, diminish tax base due to declared values based on reduced net income of rental property, and produce other administrative and socially undesirable effects.

(6) We have studied the effects of rent control measures in other jurisdictions and thereby have obtained information which we feel must be made available to the electorate prior to election day, so a knowledgeable and informed decision on this issue will be reached.

(7) This association determined that the most effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to Citizens Against Rent Control (CARC), a committee registered with the Berkeley city clerk's office and originally opposed to rent control measures.

(8) This association attempted in December 1976 to make a contribution to CARC in an amount over $250 since Berkeley is a large city and considerable funds will be needed to adequately communicate this factual information. CARC advised us that the language in the Berkeley Election Reform Act of 1974 appeared to prohibit contribution in excess of $250, but that it appeared that the Berkeley city attorney was not enforcing the limitation in recognition of its vulnerability to constitutional attack set forth in recent U.S. and California Supreme and Appellate Court decisions.

(9) Although this association was willing to make a contribution in excess of $250 at the time on the assurance that the city did not believe section 602 was enforceable, CARC asked that this association withhold it until the Berkeley Fair Campaign Practices Committee confirmed the unenforceability of section 602. This association complied with this request.

(10) On or about January 13, 1977, this association was advised that the Berkeley Fair Campaign Practices Committee met on January 12, 1977, and at that time advised CARC's campaign manager and legal counsel that in the committee's opinion section 602 was valid and enforceable, but that fairness dictated that section 602 be enforced only prospectively from the time when copies of a new annotated act were made available to the public.

(11) Relying upon what we believe to be the committee statement of January 12, 1977, and since we would have already made a contribution except for the caution of CARC, this association contributed $5,000 to CARC on January 17, 1977. Copies of the new annotated act were made public on January 24, 1977.

(12) We feel that section 602 violated our rights to express freely our views on the issue of rent control, an issue that directly effects our members and thereby needlessly limits free and open public debate on an issue of obvious public importance.

(13) We are further confused as to the meaning of section 602 of the Berkeley Campaign Ordinance, and particularly as to which acts are permitted and which acts are proscribed. The

limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our views in supplementation to those of CARC. It is our belief that such a restriction impermissibly violated our First Amendment rights to freedom and expression.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated this 4th day of April, 1977.

ANDREW R. BUSSOUD

Andrew R. Bussoud
Vice Chairman

EXHIBIT L

DECLARATION

I, A. Gordon Nicolson, certify:

(1) I am President of the Miramonte Co.

(2) This Company conducts business and owns rental property in the City of Berkeley.

(3) We have long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly affect the housing and real estate investment industry in the City of Berkeley in particular and the entire state in general.

(4) A measure relative to rent control has been placed on the Berkeley City ballot (see Exhibit C to the Complaint); the election will be held on April 19, 1977. If this measure is approved by the voters, we believe that other municipalities in California will attempt to also enact similar legislation.

(5) Based upon our experience in this field, we believe that the implementation of rent control measures in California will curtail housing availability, eliminate many rental units which will be sold by owners for non-rental purposes, lower maintenance of existing units, diminish the tax base due to declining values based on reduced net income of rental property, and produce other administrative and socially undesirable effects.

(6) We have studied the effects of rent control measures in other jurisdictions and thereby have obtained information which we feel must be made available to the electorate prior to election day, so a knowledgeable and informed decision on this issue will be reached.

(7) This Company determined that the most effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to Citizens Against Rent Control (CARC) Committee, registered with the Berkeley City Clerk's office, organized to oppose the rent control measure.

(8) We attempted in December of 1976 to make a contribution to CARC in an amount over $250.00 since Berkeley is a large City and considerable funds will be needed to adequately communicate this factual information. CARC advised us that the language in the Berkeley Election Reform Act of 1974 appeared to prohibit contributions in excess of $250.00, but that it appeared that the Berkeley City Attorney was not enforcing the limitation in recognition of its vulnerability to constitutional attack set forth in recent U.S. and Calfornia Supreme and Appellate Court decisions.

(9) Although we were willing to make a contribution in excess of $250.00 at that time on the assurance that the City did not believe Section 602 was enforceable, CARC asked that we withhold it until the Berkeley Fair Campaign Practices Commission confirmed the unenforceability of Section 602. We complied with this request.

(10) On or about January 13, 1977, this Company was advised that the Berkeley Fair Campaign Practices Commission met on January 12, 1977, and at that time advised CARC's campaign manager and legal counsel that in the Commission's opinion Section 602 was valid and enforceable, but that fairness dictated that Section 602 be enforced only prospectively from when copies of a new annotated Act were made available to the public.

(11) Relying upon what we believed to be the Commission's statement of January 12, 1977, and since we would have already made a contribution except for the caution of CARC, this Company contributed $1,000.00 to CARC on January 20, 1977. Copies of the new annotated Act were made public on January 24, 1977.

(12) We feel that Section 602 violates our rights to freely express our views on the issue of rent control, an issue that directly affects us (our members) and thereby needlessly limits free and open public debate on an issue of obvious public importance.

(13) We are further confused as to the meaning of Section 602 of the Berkeley Campaign Ordinance, and particularly as to which acts are permitted and which acts are proscribed. The limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our views in supplementation to those of CARC. It is our belief that such a restriction impermissibly violates our first amendment rights to freedom of speech and expression.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowlege and belief.

Dated: April 1, 1977

A. GORDON NICOLSON, JR.

A. Gordon Nicolson, Jr.
President
Miramonte Co.

EXHIBIT M

DECLARATION

I, John P. Hannigan, certify:

1. I am the Executive Vice President of the Southern Alameda County Board of Realtors.

2. Members of this association include many Realtors who conduct business and own rental property in other cities of California.

3. This association has long been involved with and concerned with the issue of rent control, which is an issue of wide spread concern and will unquestionably destroy the housing and real estate investment industry in the City of Berkeley, and spread throughout the entire state as devastating as a nuclear bomb - the best example of which is bankrupt New York City.

4. A measure relative to rent control has been placed on the Berkeley City ballot (see Exhibit C to the Complaint); the election will be held on April 19, 1977. It must be defeated.

5. Based upon our experience in this field, we know that the implementation of rent control measures in California will curtail housing availability, eliminate most rental units which will be sold by owners for non-rental purposes, lower maintenance of existing units, destroy the tax base due to declining values based on reduced net income of rental property, and produce other administrative and socially undesirable effects.

6. We have studied the effects of rent control measures in other jurisdictions and thereby have obtained information which we feel must be made available to the electorate prior to election day, so a knowledgeable and informed decision on this issue will be reached.

7. This association determines that the most effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to

Citizens Against Rent Control (CARC), a committee registered with the Berkeley City Clerk's office, organized to oppose the rent control measure.

8. We attempted in December, 1976, to make a contribution to CARC in an amount over $250 since Berkeley is a large city and considerable funds will be needed to adequately communicate this factual information. CARC advised us that the language in the Berkeley election Reform Act of 1974 appeared to prohibit contributions in excess of $250 but that it appeared that the Berkeley City Attorney was not enforcing the limitations in recognition of its vulnerability to constitutional attack set forth in recent U.S. and California Supreme and Appellate court decisions.

9. Although we were willing to make a contribution in excess of $250 at that time on the assurance that the city did not believe Section 602 was enforceable, CARC asked that we withhold it until the Berkeley Fair Campaign Practices Commission confirmed the unenforceability of Section 602. We complied with this request.

10. On or about January 13, 1977, this association was advised that the Berkeley Fair Campaign Practices Commission met on January 12, 1977, and at that time advised CARC's campaign manager and legal counsel that in the commission's opinion, Section 602 was valid and enforceable, but that service dictated that Section 602 be enforced only prospectively from when copies of a new annotated Act were made available to the public.

11. Relying upon what we believed to be the commission's statement of January 12, 1977, and since we would have already made a contribution except for the caution of CARC, this association contributed $1,000 written on December 22, 1976, with the understanding that it was well in advance of any deadline limiting donations.

12. We feel that Section 602 violates our rights to freely express our views on the issue of rent control, an issue that directly affects our members and thereby needlessly limits free and open public debate on an issue of obvious public importance.

13. We are further confused as to the meaning of Section 602 of the Berkeley Ordinance and particularly as to which acts are permitted and which acts are proscribed. The limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our views in supplementation to those of CARC. It is our belief that such a restriction impermissibly violates our first amendment rights to freedom of speech and expression.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: 4/1/77

J. P. HANNIGAN

J. P. Hannigan
Executive Vice President
SOUTHERN ALAMEDA COUNTY
BOARD OF REALTORS

EXHIBIT N

B/G MANAGEMENT COMPANY
2520 College Ave.
Berkeley, California 94704
(415) 848-3608

DECLARATION

We, Irving Betz and Sam Genirberg, are general partners of the B/G Management Company.

Members of this firm include many limited partners who own rental property in the City of Berkeley.

This Company has long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly affect the housing and real estate investment industry in the City of Berkeley.

A measure relative to rent control has been placed on the Berkeley City ballot (see Exhibit C to the Complaint); the election will be held on April 19, 1977.

Based upon our experience in this field, we believe that the implementation of rent control measures in California will curtail housing availability, eliminate many rental units which will be sold by owners for non-rental purposes, lower maintenance of existing units thus creating slums throughout the City of Berkeley, diminish the tax base due to a drastic decline of real estate values based on reduced net income of rental property, and produce other administrative and socially undesirable effects, which in turn will worsen the housing situation in Berkeley and will create a burden on thousand of students and other residents.

We have studied the effects of rent control measures in other jurisdictions and thereby have obtained information which we feel must be made available to the electorate prior to election day, so a knowledgeable and informed decision on this issue will be reached.

The B/G Management Company determined that the most effective means of communicating these thoughts and information as well as its belief was to make a contribution directly to Citizens Against Rent Control (CARC), a committee registered with the Berkeley City Clerk's Office organized to oppose the rent control measure.

We were advised that the language in the Berkeley Election Reform Act of 1974 appeared to prohibit contributions in excess of $250 but that it appeared that the Berkeley City Attorney was not enforcing the limitation in recognition of its vulnerability due to constitutional attack set forth in recent U.S. and California Supreme and Appellate Court decisions.

Although we were willing to make a contribution in excess of $250 at the time due on the assurance that the City did not believe Section 602 was enforceable, CARC asked that we withhold it until the Berkeley Fair Campaign Practices Commission confirmed the unenforceability of Section 602. We complied with this request.

On or about January 13, 1977, this company was advised that the Berkeley Fair Campaign Practices Commission met on January 12, 1977, and at that time advised CARC's campaign manager and legal counsel that in the Commission's opinion Section 602 was valid and enforceable, but that fairness dictated that Section 602 be enforced only prospectively from when copies of a new annotated Act were made available to the public.

Relying upon what we believed to be the Commission's statement of January 12, 1977, and since we would have already made a contribution except for the caution of CARC, this Company contributed $2,000.00 to CARC on January 21, 1977 after assurances from legal counsel of CARC that contributions above $250.00 can be made legally if such contribution will be turned over to CARC by January 21, 1977. Copies of the new annotated Act were made public on January 24, 1977.

We feel that Section 602 violates our rights to express freely our views on the issue of rent control, an issue that directly affects us (our members), and thereby needlessly limits free and open public debate on an issue of obvious public importance.

We are further confused as to the meaning of Section 602 of the Berkeley Campaign Ordinance and particularly as to which acts are permitted and which acts are proscribed. The limitation appears to apply to all monies spent "with respect to" the rent control issue, including publication of our view in supplementation to those of CARC. It is our belief that such a restriction impermissibly violates our first amendment rights to freedom of speech and expression.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: Apr. 5, 1977

SAM GENIRBERG

Sam Genirberg

Official Capacity of the Signer with the Association

DOBBS, DOYLE & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Apr 6 1977
RENE C. DAVIDSON, *County Clerk*
By: JAMES KITTERMAN, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON MCDUFFIE, a California Corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

NO. 493837-0

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

It appearing to the satisfaction of the Court, upon the reading of the verified complaint and declarations of the plaintiffs, and the Points and Authorities submitted in support thereof, that the case therein presented is a proper case for issuance of an order to show cause and a temporary restraining order as prayed for in said complaint and that unless a temporary restraining order issues plaintiffs will suffer irreparable injury before the matter can be heard on notice; now therefore

IT IS HEREBY ORDERED that defendants CITY OF BERKELEY, CALIFORNIA, a municipal corporation; BERKELEY CITY COUNCIL, THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASON, THOMAS DONOVAN, FAITH OTIS, DAVID B. ROSENTHAL and SANDY MILLER, as members of the BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION and DOES I through XX, inclusive, appear before this Court in Department 19 at the Courthouse located at 1221 Oak Street, Oakland, California, on April 12, 1977, at the hour of 2:00 p.m., then and there to show cause, if any they have, why a preliminary injunction should not be ordered restraining and enjoining said defendants, and each of them, and any and all persons acting on their behalf from enforcing or attempting to enforce, directly or indirectly, Section 602 of the Berkeley Election Reform Act of 1974 and any and all limits or restrictions on contributions to and/or expenditures by plaintiffs contained therein.

IT IS FURTHER ORDERED that defendants and each of them, and all persons acting on their behalf be restrained pending the hearing of this Order to Show Cause from enforcing or attempting to enforce against plaintiffs or their officers, agents or employees, directly or indirectly, Section 602 of the Berkeley Election Reform Act of 1974 and any and all limits or restrictions on contributions to and/or expenditures by plaintiffs therein contained insofar as they apply to the April 19, 1977, election concerning the initiative measure commonly known as Proposition B (the "Rent Control" measure).

DATED: April 6, 1977.

HAROLD B. HOVE

Judge of the Superior Court

DOBBS, DOYLE & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Apr 18 1977
RENE C. DAVIDSON, *County Clerk*
By MAURINE EVANS, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON McDUFFIE, a California corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DeVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

No. 493837-0

ORDER SUSTAINING APPLICATION FOR PRELIMINARY INJUNCTION

The application of plaintiffs for a Preliminary Injunction came on regularly to be heard on April 12, 1977, pursuant to the Temporary Restraining Order and Order to Show Cause issued on April 6, 1977. Vigo G. Nielsen, Jr., James R. Parrinello and Peter A. Bagatelos appeared as counsel for plaintiffs, and Michael Lawson appeared as counsel for all defendants.

The matter having been submitted on the pleadings, affidavits, declarations and memorandum of points and authorities on file herein; and proof having been made to the satisfaction of the Court and good cause appearing therefor:

IT IS HEREBY ORDERED that during the pendency of this action defendants, and each of them, and their agents, servants and employees, and all persons acting under, in concert with, or for them, shall be and they are hereby enjoined and restrained from enforcing or attempting to enforce, against plaintiffs:

(a) Section 602 of the Berkeley Election Reform Act of 1974 and any and all contribution limits or restrictions contained therein; and

(b) Section 604 of the Berkeley Election Reform Act of 1974 to require plaintiff committee (CARC) to pay into the Berkeley General Fund campaign contributions received between January 12, 1977 and January 20, 1977, in the approximate amount of $18,600.00.

Plaintiffs shall continue in effect the $2,500.00 undertaking previously filed with the court, during the pendency of this action.

Dated: April 12, 1977

JOHN P. SPARROW

John P. Sparrow
Judge of the Superior Court

DOBBS, DOYLE & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
One Maritime Plaza, Suite 2500
The Alcoa Building
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Apr 27 1977
RENE C. DAVIDSON, *County Clerk*
A. CARNEY, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON MCDUFFIE, a California Corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION: PARTICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

NO. 493837-0

AMENDMENT TO COMPLAINT

Plaintiffs amend the complaint on file herein as follows:

A. By adding the following language after page 16, line 12:

FOURTH CAUSE OF ACTION

Declaratory Relief

1. Plaintiffs allege and incorporate herein by this reference each and every allegation contained in the First Cause of Action as though set out at length hereafter.

2. The April 19, 1977, election is now concluded and plaintiff CARC has accumulated a campaign debt of approximately $8,000.

3. Plaintiff CARC desires to solicit and collect further contributions from individuals and entities in excess of $250.00 to satisfy such campaign debts.

4. Plaintiff CARC is informed and believes that there are individuals and entities willing and able to make contributions in excess of $250.00 to assist in satisfying CARC's remaining campaign debts, but are unwilling to do so because the Berkeley Fair Campaign Practices Commission resolved to enforce the restrictions contained in Section 602.

5. Plaintiff CARC desires to solicit and collect contributions in excess of $250.00 from such persons.

6. Section 602 prohibits contributions in excess of $250.00 and therefore precludes CARC from obtaining such contributions unless and until Section 602 is declared invalid and unenforceable.

7. Wherefore, plaintiff CARC prays for judgment declaring that Section 602 of the Berkeley Election Reform Act of 1974 is unconstitutional, invalid and void, and that plaintiff CARC can accept individual contributions in excess of $250.00 to satisfy its remainding campaign debts.

B. By adding the following language after page 17, line 8;

7. For reasonable attorney's fees for violation of plaintiff's civil rights, pursuant to 42. U.S.C. § 1982, 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

Dated: April 22, 1977

DOBBS, DOYLE & NIELSEN

By VIGO G. NIELSEN, JR.
Vigo G. Nielsen, Jr.
Attorneys for Plaintiffs

VERIFICATION

I am the Campaign Manager for plaintiff CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING (CARC) in the above entitled action; I have read the foregoing AMENDMENT TO COMPLAINT and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 25, 1977 at San Francisco, California.

DONALD SOLEM

Donald Solem

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of San Francisco; I am over the age of eighteen years and not a party to the within above entitled action; my business address is Suite 2500, The Alcoa Building, One Maritime Plaza, San Francisco, California.

On April 26, 1977, I served the within AMENDMENT TO COMPLAINT on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

MICHAEL LAWSON, City Attorney
2171 McKinley Avenue, Room 220
Berkeley, California 94704

I, ARLENE OTANI, declare under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 1977 at San Francisco, California.

ARLENE OTANI

Arlene Otani

MICHAEL LAWSON, City Attorney
2171 McKinley Avenue, Room 220
Berkeley, California 94704
Telephone: (415) 644-6380
Attorney for Defendants

Superior Court of California

COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON McDUFFIE, a California Corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION: PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

No. 493837-0

ANSWER

Come now defendants CITY OF BERKELEY, CALIFORNIA; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION: PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, and DAVID B. ROSENTHAL, and answer the amended complaint on file as follows:

FIRST CAUSE OF ACTION

1. Defendants lack sufficient information and belief to be able to answer paragraphs 1, 2, 4, 11, 12, 13 and 14, and, based thereon, deny generally and specifically each and every allegation contained therein.

2. Defendants deny each and every allegation contained in paragraph 16.

3. Except as to lines 5 through 7 on page 10, defendants deny each and every allegation contained in paragraph 17.

4. Defendants deny each and every allegation contained in paragraph 19.

SECOND CAUSE OF ACTION

1. Defendants admit by non-answer, affirmatively deny or deny for lack of information or belief, the allegations contained in paragraph 1 to the same extent such allegations are set forth in the First Cause of Action.

THIRD CAUSE OF ACTION

1. Defendants admit by non-answer, affirmatively deny or deny for lack of information and belief, the allegations contained in paragraph 1 to the same extent such allegations are set forth in the First Cause of Action and re-alleged in the Second Cause of Action.

2. Defendants lack sufficient information and belief to be able to answer the allegations in lines 22 through 23 of paragraph 3 (page 12), and based thereon, defendants deny each and every allegation contained in lines 22 through 23.

3. Defendants admit to the allegations of paragraph 4 up to "prospectively" at line 6 (page 13) and deny the allegation thereafter set forth in said sentence. Defendants admit "such texts were publicly distributed on January 24, 1977."

4. Defendants lack sufficient information and belief to be able to answer the allegations set forth in paragraph 5, and based thereon, defendants deny each and every allegation contained therein.

5. Defendants lack sufficient information and belief to be able to answer the allegations set forth in lines 12 through 14 of paragraph 6 (page 14), and based thereon, defendants deny each and every allegation contained therein.

6. Defendants deny each and every, all and singular, allegation contained in paragraphs 7, 8 and 9.

FOURTH CAUSE OF ACTION

1. Defendants admit by non-answer, affirmatively deny or deny for lack of information and belief, the allegations contained in paragraph 1 to the same extent such allegations are set forth in First Cause of Action and re-alleged in the Second and Third causes of Action.

2. Answering paragraph 2, defendants admit the April 19, 1977 election is now concluded but lack sufficient information and belief to answer the allegation thereafter set forth, and based thereon, defendants deny such allegation.

3. Defendants lack sufficient information and belief to be able to answer the allegations set forth in paragraphs 3, 4 and 5, and based thereon, deny each and every allegation contained therein.

* * *

AFFIRMATIVE DEFENSE

As an affirmative defense, defendants assert the issues raised in each cause of action are now moot and no justifiable controversy exists.

WHEREFORE, defendants request that plaintiffs take nothing by their action and that the complaint be dismissed.

Dated: May 25, 1977

MICHAEL LAWSON
City Attorney

By MICHAEL LAWSON
Attorney for Defendants

CERTIFICATE OF SERVICE

ACTION NO. 493837-0

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is 2171 McKinley Avenue, Room 220, Berkeley, California 94704. On May 25, 1977, I served a copy of the attached ANSWER by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Berkeley, California, addressed as follows:

VIGO G. NIELSEN, JR., ESQ.
DOBBS, DOYLE & NIELSEN
One Maritime Plaza, Suite 2500
The Alcoa Building
San Francisco, California 94111

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: May 25, 1977

FLORENCE COCHRAN

Florence Cochran

DOBBS & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Aug 5 1977
RENE C. DAVIDSON, *County Clerk*
A. CARNEY, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON MCDUFFIE, a California corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,
Defendants.

No. 493837-0

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO DEFENDANTS CITY OF BERKELEY, ET AL. AND TO THE CITY ATTORNEY OF BERKELEY, MICHAEL LAWSON, THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on August 17, 1977 at 2:00 P. M., or as soon thereafter as the matter can be heard, at the courtroom of Department 19 at 1225 Fallon, Oakland, California, plaintiffs will move the above-entitled Court for an order striking the answer herein and/or entering judgment for plaintiffs on the ground that Section 602 of the Berkeley Election Reform Act of 1974, as amended, is unconstitutional on its face.

Said motion will be made on the ground that there is no defense to the action, that there is no triable issue as to any material fact, and that plaintiffs are entitled to judgment as a matter of law.

Said motion will be based on this notice, the pleadings, records and files herein, and on the declarations of Donald Solem, Victor Stachura, and M. R. Griffin, and the memorandum of points and authorities served and filed herewith.

Dated: August 4, 1977

DOBBS & NIELSEN

By: VIGO G. NIELSEN, JR.
Vigo G. Nielsen, Jr.
Attorneys for Plaintiffs

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

I am a citizen of the United States and a resident of the County of San Francisco; I am over the age of eighteen years and not a party to the within above entitled action; my business address is Suite 2500, The Alcoa Building, One Maritime Plaza, San Francisco, California.

On August 4, 1977, I served the within MOTION FOR SUMMARY JUDGMENT and NOTICE OF MOTION on the defendants in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

MICHAEL LAWSON, ESQ.
City Attorney
2171 McKinley Avenue, Room 220
Berkeley, CA 94704

I, ARLENE OTANI, declare under penalty of perjury that the foregoing is true and correct.

Executed on August 4, 1977 at San Francisco, California.

ARLENE OTANI
Arlene Otani

DOBBS & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Aug 5 1977
RENE C. DAVIDSON, *County Clerk*
A. CARNEY, *Deputy*

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON McDUFFIE, a California corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIRCAMPAIGN PRACTICES COMMISSION; PATRICIA DeVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley FairCampaign Practices Commission and DOES I through XX, inclusive,
Defendants.

NO. 493837-0

MOTION FOR SUMMARY JUDGMENT

I

INTRODUCTION

This action was commenced on April 6, 1977, only 13 days prior to the April 19 Berkeley municipal elections. Plaintiffs initially sought—and obtained—a temporary restraining order and a preliminary injunction prohibiting defendants from enforcing or attempting to enforce Section 602 of the Berkeley Election Reform Act of 1974 against plaintiffs. In a nutshell, Section 602 prohibits the making of contributions exceeding $250 to committees supporting or opposing ballot measures on the Berkeley ballot.

There are really only two issues in dispute in this litigation:

1) Is Section 602 unconstitutional on its face; and

2) Assuming, *arguendo*, that Section 602 is valid, are defendants estopped from enforcing it against plaintiffs in light of particular events which occurred in the months prior to the April 19 election.

The latter issue presents questions of fact which cannot be resolved by this motion for summary judgment and which will require substantial discovery prior to full trial on the merits. However, that factual dispute is irrelevant and moot if Section 602 is invalid as a matter of law.

We believe and we believe all counsel will agree that a ruling on the validity of Section 602 at this time will resolve a fundamental issue of constitutional law and obviate the necessity for a time-consuming trial of secondary factual issues. For these reasons, plaintiffs bring the instant motion.

II

QUESTION PRESENTED

The only question before the Court at this time is whether Section 602 of the Berkeley Reform Act of 1974, as amended, is constitutionally infirm on its face. Section 602 reads as follows:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."

III

SUMMARY OF MATERIAL FACTS

Citizens Against Rent Control (CARC) is a duly organized campaign committee existing in accordance with Section 402 of the Berkeley Election Reform Act of 1974, as amended ("The Act"). CARC's primary objective and function was to organize opposition to and to seek the defeat of Measure B on the April 19, 1977 Berkeley Municipal Ballot. Measure B, if passed and to the extent legally enforceable, would have imposed a system of rent controls over certain types of residential housing in Berkeley. A copy of proposed Measure B is attached as Exhibit C to plaintiffs' complaint on file herein.

Section 602 prohibits individuals or entities from making, and campaign committees from soliciting or accepting, contributions exceeding $250 to a committee supporting or opposing the passage of any ballot measure.

Between January 12 and 24, 1977, CARC received a total of $18,600 in campaign contributions in excess of $250; such contributions included $5,000 from the California Association of Realtors, $1,000 from plaintiff Mason McDuffie, $5,000 from plaintiff Berkeley Board of Realtors, $5,000 from the Apartment Political Action Committee, $1,000 from the Miramonte Company, and $2,000 from the B/G Management Company. At a duly-held meeting on March 30, 1977, a majority of the Berkeley Fair Campaign Practices Commission voted that CARC's receipt of the aforementioned contributions (and others) violated Section 602 of the Act, and ordered that $18,600 in such contributions exceeding $250 be forfeited by CARC to the city.

The April 19 election was held and Measure B was soundly defeated. However, as a result of its extensive campaign efforts and this lawsuit, CARC accumulated a campaign deficit of $8,308.84, which amount remains outstanding. CARC desires to satisfy those obligations by soliciting and accepting contributions from previous supporters including those who contributed in excess of $250. CARC has been advised by some supporters who have already contributed $250 that they are willing and able to make further contributions and would do so immediately but for the unsettled situation concerning the validity of Section 602. (See Exhibits A, B & C).

IV

ARGUMENT

A. Plaintiffs' arguments in support of this motion are identical to those used in its Memorandum of Points and Authorities in support of its Application for Preliminary Injunction. For the Court's convenience, we attach and incorporate herein by reference pertinent pages (pages 2 through 14 and 18 through 51) of that Memorandum, as Appendix A hereto.

B. Since the filing of the aforementioned Memorandum, several relevant authorities have come to plaintiffs' attention. (pages 184-189 of the Clerk's transcript contain the Points and Authorities in Support of the Motion for Summary Judgment)

EXHIBIT A

DECLARATION OF DONALD L. SOLEM

I, DONALD L. SOLEM, declare:

1. I am the owner of Solem & Associates, a San Francisco bay area based firm which, among other things, specializes in the management of political campaigns, including ballot measure propositions.

2. The firm of Solem & Associates served as campaign manager for Citizens Against Rent Control/ Coalition For Fair Housing/No On B (CARC), a committee, registered with the City Clerk of Berkeley, which opposed and sought defeat of Measure B, a proposed Charter amendment to institute rent controls in Berkeley, on the April 19, 1977 Berkeley Municipal Ballot.

3. Section 602 of the Berkeley Election Reform Act of 1974 prohibits individuals or entities from making and campaign committees from soliciting or accepting contributions exceeding $250.00 to a committee supporting or opposing the passage of any ballot measure.

4. During the period January 12 through 24, 1977, CARC received a total of $18,600.00 in campaign contributions in excess of $250.00, which included $5,000.00 from plaintiff Berkeley Board of Realtors and $1,000.00 from plaintiff Mason McDuffie.

5. At its meeting on March 30, 1977, the Berkeley Fair Campaign Practices Commission voted that CARC's receipt of the aforementioned contributions, and others, violated Section 602 of the Act, and thereby ordered that $18,600.00 of such contributions exceeding $250.00 be forfeited by CARC to the City of Berkeley.

6. CARC therefore brought this suit to challenge the validity of Section 602 and the decision of the Berkeley Commission.

7. As a result of CARC's extensive campaign efforts in advocating the defeat of Measure B and the costs attendant to this lawsuit, CARC has accumulated a current campaign deficit of $8,308.84, which amount remains outstanding.

8. To meet these obligations, CARC desires to solicit and accept contributions from previous supporters, including those who contributed in excess of $250.00, to eliminate the deficit. Some supporters who have already contributed $250.00 have advised CARC that they are willing and able to make contributions to help eliminate the deficit and would do so immediately but for their concern over the undecided validity of Section 602.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: August 1, 1977

DONALD L. SOLEM

Donald L. Solem

EXHIBIT B

Berkeley Board of Realtors

1553 GROVE ST. • BERKELEY, CALIFORNIA 94709 • POST OFFICE BOX 1224, BERKELEY, CALIFORNIA 94701

DECLARATION

I, VICTOR STACHURA, certify:

1) I am President of the Berkeley Board of Realtors.

2) Members of this Berkeley Board of Realtors include many Realtors (brokers), Realtor-Associates (salesmen) who conduct business in the City of Berkeley.

3) This Board has long been involved with and concerned with the issue of rent control, which is an issue of widespread concern and will significantly affect the housing and real estate investment industry in the City of Berkeley in particular, and the entire State in general.

4) Citizens Against Rent Control, a committee registered with the Berkeley City Clerk's office, and organized to oppose a rent control measure which was submitted to the voters of Berkeley in the April 19, 1977 election, presented information and material to the voters which we believed fairly represented views similar to those of this Board with regard to the rent control issue.

5) We have been advised that in the process of communicating information to the public, Citizens Against Rent Control incurred various expenses which resulted in a present outstanding indebtedness in excess of $8,000.

6) In order to assist CARC to eliminate its outstanding indebtedness, this Board may desire to make a contribution in excess of $250 to CARC. However,

because of the present uncertainties regarding Section 602 of the Berkeley Election Reform Act, which imposes a $250 maximum contribution limitation to ballot measure committees, this Board is reluctant to make contributions in excess of $250. But for the existence of Section 602, this Board may make such a contribution.

I declare under penalty of perjury that the foregoing is true and corrent to the best of my knowledge and belief.

Dated: August 2nd 1977

VICTOR F. STACHURA

Victor F. Stachura, *President*

EXHIBIT C

DECLARATION

I, M. R. GRIFFIN, certify:

1) I am a partner of Mason-McDuffie Co.

2) Mason-McDuffie Co. has been active in the real estate business in Berkeley since 1887. It sells, exchanges, rents, manages, insures and finances real property in Berkeley and employs several hundred persons in its main office in Berkeley.

3) Citizens Against Rent Control (CARC), a committee registered with the Berkeley City Clerk's Office and organized to oppose a rent control measure which was submitted to the voters of Berkeley for the April 19, 1977 Berkeley Municipal ballot, presented informational views and facts regarding rent control to the voters similar to those held by Mason-McDuffie Co.

4) We have been advised that in the process of communicating information to the public, CARC incurred various expenses which resulted in a present outstanding indebtedness in excess of $8,000.

5) Mason-McDuffie Co. may wish to make a contribution in excess of $250 to CARC for purposes of assisting to eliminate the outstanding indebtedness incurred by that committee. However, because of the present uncertainties regarding Section 602 of the Berkeley Election Reform Act, which imposes a $250 maximum contribution limitation to ballot measure committees, Mason-McDuffie Co. is reluctant to make a contribution in excess of $250. But for the limitations imposed by Section 602, Mason-McDuffie Co. might make such a contribution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED: August 2, 1977.

M. R. GRIFFIN

M. R. Griffin, *Partner*
MASON-MCDUFFIE CO.

MICHAEL LAWSON, City Attorney
2134 Grove Street
Berkeley, California 94704
Telephone: (415) 644-6380
Attorney for Defendant City of Berkeley

In The Superior Court of the State of California

FOR THE COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association, MASON MCDUFFIE, a California Corporation, BERKELEY BOARD OF REALTORS, a California non-profit association, BETTY GERITZ, MURIEL ROSENKRANZ AND EVA FLOYSTRUP,

Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION: PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission and DOES I through XX, inclusive,

Defendants.

NO. 493837-0

ANSWER TO AMENDED COMPLAINT.

Defendants answer the amended complaint filed herein by Plaintiffs as follows:

1. With respect to Paragraph 1 of the Fourth Cause of Action, Defendants incorporate by reference their answer to each and every allegation contained in the First Cause of Action.

2. With respect to Paragraphs 2, 3, 4, and 5 of the Fourth Cause of Action, Defendants have insufficient information or belief to be able to answer such allegation and based thereon deny each and every allegation contained therein.

WHEREFORE, Defendants that Defendants take nothing by their complaint as amended, and that Defendants be awarded their costs of defending this action and such additional relief as the court deems appropriate.

Dated: August 22, 1977

MICHAEL LAWSON,
City Attorney

By: MICHAEL LAWSON
Attorney for Defendants

CERTIFICATE OF SERVICE

ACTION NO. 493837-0

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is 2171 McKinley Avenue, Room 220, Berkeley, California 94704. On August 22, 1977, I served a copy of the attached ANSWER TO AMENDED COMPLAINT by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Berkeley, California, addressed as follows:

VIRGO G. NIELSEN, ESQ.
DOBBS & NIELSEN
One Maritime Plaza, Suite 2500
The Alcoa Building
San Francisco, California 94111

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: August 22, 1977

JOYCE M. LOPES

Joyce M. Lopes

DOBBS & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
PETER A. BAGATELOS, ESQ.
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Plaintiffs

ENDORSED
FILED
Nov 17 1977
RENE C. DAVIDSON, *County Clerk*
By: G. L. Robson, *Deputy*

Entry Date Nov 18 1977
Vol 49: Page 2: (Reel)
RENE C. DAVIDSON, *County Clerk*
By: JEAN PERRAMO, *Deputy*

In The Superior Court of the State of California

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association, et al.,
Plaintiffs,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; et al.,
Defendants.

No. 493837-0

STIPULATION AND ORDER

STIPULATION

IT IS HEREBY STIPULATED by and between the parties hereto that Page Two (2), Line Two (2) of the Judgment entered herein on September 29, 1977, at Page Three (3) of Judgment Book 493, and reading as follows: "Section 9 of the California Constitution, and that plaintiffs'..." may be corrected to conform to the Judgment actually rendered by the Honorable John P. Sparrow, Judge of the Superior Court on said date, and to read as follows: "Section 2 of the California Constitution, and that plaintiffs'..."

It is further stipulated by and between the parties hereto that Page Two (2), Line Thirteen (13), of the Order Granting Summary Judgment for Plaintiffs signed on September 27, 1977 by the Honorable John P. Sparrow, Judge of the Superior Court, reading as follows: "Constitution and Article I, Section 9 of the California . . ." may be corrected to conform to the Order Granting Summary Judgment for Plaintiffs actually rendered by Judge Sparrow to read as follows: "Constitution and Article I, Section 2 of the California . . .".

It is further stipulated that the aforedescribed correction of said Judgment and Order Granting Summary Judgment for Plaintiffs may be entered *nunc pro tunc* to appear of record as the respective dates said Judgment was originally made and entered and said Order was originally signed.

Dated: October 21, 1977.

PETER A. BAGATELOS

Peter A. Bagatelos
Attorneys for Plaintiffs

MICHAEL LAWSON

Michael Lawson
Attorneys for Defendants

ORDER

IT IS SO ORDERED.

Dated: Nov 17 1977

JOHN P. SPARROW

John P. Sparrow
Judge of the Superior Court

MICHAEL LAWSON, City Attorney
CHARLES O. TRIEBEL, JR., Attorney at Law
2134 Grove Street, Second Floor
Berkeley, California 94704
Telephone: (415) 644-6380

FILED
Dec 1 1977
RENE C. DAVIDSON, *County Clerk*
By: NANCI E. ALVAREZ, [sic]
Deputy

Attorneys for Defendants and Appellants

Superior Court of California

COUNTY OF ALAMEDA

CITIZENS AGAINST RENT CONTROL, et al.,
Plaintiffs and Respondents,
vs.
CITY OF BERKELEY, et al.,
Defendants and Appellants.

No. 493837-0

NOTICE OF APPEAL AND NOTICE TO PREPARE REPORTER'S AND CLERK'S TRANSCRIPTS

To Plaintiffs and Respondents and their attorneys of record, Dobbs & Nielson [sic], and to the Clerk of the above-entitled court:

NOTICE IS HEREBY GIVEN that defendants appeal from the whole of every portion of the judgment made and entered in the above-entitled action on September 29, 1977, in Judgment Book 493 at page 3, adverse to defendants and in favor of plaintiffs, and that defendants desire to present their appeal by way of a Reporter's transcript and Clerk's transcript as provided by Rules 4 and 5 of the California Rules of Court.

The Clerk is hereby requested to cause to be prepared a complete Reporter's transcript of the oral proceedings had and taken in connection with the hearings held in Department 19 on on April 12, 1977 and August 24, 1977.

The Clerk is likewise requested to prepare a complete Clerk's transcript and to include therein the following:

1. Complaint for Injunctive and Declaratory Relief and Exhibits and Declaration thereto.
2. Memorandum of Points and Authorities in Support of Application for Injunctive and Declaratory Relief.
3. Temporary Restraining Order and Order to Show Cause.
4. Defendants' Memorandum of Points and Authorities in Opposition to Preliminary Injunction.
5. Declaration of Edythe Campbell.
6. Declaration of Michael Lawson.
7. Order Sustaining Application for Preliminary Injunction.
8. Amendment to Complaint.
9. Answer.
10. Notice of Motion for Summary Judgment.
11. Motion for Summary Judgment.
12. Answer to Amended Complaint.
13. Defendants' Memorandum of Points and Authorities in Opposition to Motion for Summary Judgment.
14. Order Granting Summary Judgment for Plaintiffs.
15. Judgment.
16. Clerk's Notice of Entry of Judgment.
17. Stipulation and Order of November 17, 1977.

Dated: December 1, 1977

MICHAEL LAWSON,
City Attorney
CHARLES O. TRIEBEL, JR.,
Attorney at Law

By MICHAEL LAWSON
Attorneys for Defendants and Appellants

CERTIFICATE OF SERVICE

ACTION NO. 493837-0

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party in the within above entitled action. My business address is 2134 Grove Street, Second Floor, Berkeley, California 94704. On December, 1977, I served a copy of the attached NOTICE OF APPEAL AND NOTICE TO PREPARE REPORTER'S AND CLERK'S TRANSCRIPTS by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Berkeley, California, addressed as follows:

VIGO G. NIELSON, JR., ESQ.
Dobbs & Nielsen
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated: December 1, 1977

HELEN FINNEGAN

Helen Finnegan

FILED
Dec 2 1977
RENE C. DAVIDSON, *County Clerk*
By: NANCI E. ALVAREZ, *Deputy*

Superior Court Of California, County Of Alameda

CITIZENS AGAINST RENT CONTROL *Plaintiff(s)*	**Case Number 593827-0**
VS	**Notice To Attorney In Re Notice Of Appeal**
CITY OF BERKELEY, et al *Defendant(s)*	

To:

Respondent

In compliance with RULES ON APPEAL adopted by the Judicial Council, this is to inform you that notice of appeal in the above matter was filed: December 1, 1977.

RENE C. DAVIDSON, County Clerk and Clerk of the Superior Court of the State of California for the County of Alameda

By NANCI E. ALVAREZ
Deputy

CERTIFICATE OF MAILING

I do hereby certify that, on December 2, 1977, I mailed copies of the above notice, as indicated below, by depositing them enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Post Office at Oakland, California.

VIGO G. NEILSEN, JR.
Suite 2500, The Alcoa Bldg.
One Maritime Plaza
San Francisco, CA 94111

RENE C. DAVIDSON,
County Clerk

By: NANCI E. ALVAREZ
Deputy

Office-Supreme Court, U.S.
FILED
JAN 31 1981

No. 80-737

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; STEVE MAYER, JESS ROSENBERG, PETER COHON, BARBARA BERNSTEIN, JUDITH LEFKOWITZ, GARY GRESHER, as members of the Berkeley Fair Campaign Practices Commission,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS APPEAL

NATALIE E. WEST
City Attorney
CHARLES O. TRIEBEL, JR.
COUNSEL OF RECORD
2180 Milvia Street, Fifth Floor
Berkeley, California 94704
Telephone: (415) 644-6380
Attorneys for Appellees.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

QUESTIONS PRESENTED

1. Did the California Supreme Court properly uphold an initiative ordinance adopted by the people of Berkeley which limits the size of campaign contributions to political committees supporting or opposing ballot measures?

2. Is this case distinguishable from the decision of the United States Court of Appeals for the Fifth Circuit in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980)?

PARTIES

The current members of the Berkeley Fair Campaign Practices Commission are Steve Mayer, Jess Rosenberg, Peter Cohon, Barbara Bernstein, Judith Lefkowitz, and Gary Gresher.

TABLE OF CONTENTS

	Page
Questions presented	i
Parties	i
Jurisdiction	2
Statutes involved	2
Statement	2
Argument	4
I	
The California Supreme Court correctly upheld the constitutionality of the Berkeley campaign contribution limitation	4
A. The impact of contribution limitations on protected rights	4
B. Governmental interests	10
C. The contribution limitation is the least restrictive means of promoting this interest	13
II	
This case is distinguishable from Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980)	14
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

Page

Bellotti v. First National Bank of Boston, 435 U.S. 765 (1978) 11, 12

Buckley v. Valeo, 424 U.S. 1 (1976) 4, 5, 6, 7, 8, 9, 10, 15

C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) 12

Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980) 2

Citizens for Jobs & Energy v. Fair Political Practices Comm'n, 16 Cal.3d 671, 129 Cal.Rptr. 106, 547 P.2d 1386 (1976) 7

First National Bank of Boston v. Bellotti, 436 U.S. 765 (1978) 4, 5

Fullilove v. Klutznick, ... U.S. ....., 48 U.S.L.W. 4979 (July, 1980) 5

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) ..... i, 5, 14, 15, 16, 17

Let's Help Florida v. Smathers, 453 F.Supp. 1003 (N.D. Fla. 1978) 15

Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal. App. 123, 131 Cal.Rptr. 350 (1976) 12

Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979) 10

Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) 12

United States v. Automobile Workers, 352 U.S. 567 (1957) 11, 14

Wilson v. Superior Court, 13 Cal.3d 652, 119 Cal.Rptr. 468, 532 P.2d 116 (1975) 10

Table of Authorities Cited

Constitutions

Page

United States Constitution:
First Amendment 4, 5, 8, 10

California Constitution:
Article I, Section 2 ..... 4, 10

Ordinances

Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974): ..... passim
Section 206 7
Sections 510-518 7
Section 602 ..... 2, 3, 4
Section 604 3

Rules

U.S. Supreme Court Rule 16.1(b) 1

Statutes

California Election Code, Section 22808 2

28 U.S.C. Section 1257(2) (1976) 2

No. 80-737

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,
Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; STEVE MAYER, JESS ROSENBERG, PETER COHON, BARBARA BERNSTEIN, JUDITH LEFKOWITZ, GARY GRESHER, as members of the Berkeley Fair Campaign Practices Commission,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS APPEAL

Pursuant to Rule 16.1(b) of the Rules of this Court, appellees move that this appeal be dismissed on the ground that it does not present a substantial federal question.

JURISDICTION

This case is an appeal from decision of the California Supreme Court, *Citizens Against Rent Control v. City of Berkeley*, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980), filed August 7, 1980. The decision is set out in the appendix to the Jurisdictional Statement at A-1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

STATUTES INVOLVED

The relevant portions of the Berkeley Election Reform Act of 1974 are set forth in the Jurisdictional Statement at 3-4 (hereinafter "J.S.") and Appendix to Jurisdictional Statement at A-53 (hereinafter "J.S. App.").

STATEMENT

Berkeley's Election Reform Act of 1974 (Ord. No. 4700-N.S.) regulates its municipal elections. Section 602 of that ordinance provides:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."[1]

At the April 19, 1977 municipal election, the voters of Berkeley voted on a proposed charter amendment initia-

---

[1]Section 602 is authorized by Section 22808 of the California Elections Code which provides: "A city may by ordinance or resolution limit campaign contributions in municipal elections."

tive concerning rent control. Appellant Citizens Against Rent Control (hereinafter "CARC") is a campaign committee that opposed the measure. CARC raised over $108,000 from more than 1,300 contributors. Of this, six contributors made contributions in excess of the $250 limit. These contributions totalled $18,600.

On March 30, 1977, the Fair Campaign Practices Commission ordered CARC to pay the surplus funds into the City's General Fund as required by Section 604 of the Act.[2] CARC responded by filing a complaint for injunctive and declaratory relief against the City and the Commission, contending that Section 602 violated its rights of freedom of speech and association under the California and United States Constitutions and violated the rights of other named plaintiffs who desired to make contributions larger than $250. Two weeks before the election, the trial court granted a preliminary injunction against enforcement of the contribution limitation. However, CARC had ended all fund raising almost a month before the election and did not raise additional funds during this period. The campaign against the initiative was successful and the proposed Charter Amendment was defeated.

After the election, CARC amended its complaint to allege that it had accumulated a campaign debt of ap-

---

[2]Section 604 provides: "If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General Fund of the City."

proximately $8,000 and it sought to solicit large contributions to satisfy this debt. CARC then moved for summary judgment on the ground that Section 602 was invalid on its face. The superior court granted the motion and rendered a judgment declaring that Section 602 violated the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution. On appeal, the California Supreme Court reversed the judgment, concluding that "the Berkeley ordinance is necessary to the accomplishment of compelling governmental interests, and uses the least restrictive means to achieve those ends. It violates neither the First Amendment nor Article I, section 2, of the California Constitution." J.S. App. A-18.

This appeal follows.

ARGUMENT

I

THE CALIFORNIA SUPREME COURT CORRECTLY UPHELD THE CONSTITUTIONALITY OF THE BERKELEY CAMPAIGN CONTRIBUTION LIMITATION

A. The Impact of Contribution Limitations on Protected Rights

There are two decisions of this Court that are particularly relevant to an analysis of this case. *Buckley v. Valeo*, 424 U.S. 1 (1976), upheld contribution limitations but invalidated expenditure limitations contained within a federal act that regulates only candidate campaigns. *First National Bank of Boston v. Bellotti*, 436 U.S. 765 (1978), struck down a Massachusetts statute that completely prohibited corporate expenditures and contributions in referenda campaigns. In this case, the California Supreme Court

distinguished *Bellotti* and held that the Berkeley ordinance, like the portions of the federal statute upheld in *Buckley*, serve a compelling governmental interest. In another case, the Fifth Circuit has followed *Bellotti* and has held that a Florida statute limiting contributions to ballot measures is invalid. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980). For the reasons set forth herein, appellees believe that the decision of the California Supreme Court is correct and that the decision of the Fifth Circuit can be distinguished from the instant case.

Appellees do not dispute that the contribution limitations involve fundamental interests of speech and association and must be supported by sufficiently important governmental interests. But this is merely the beginning and not, as appellants would have it, the end of the inquiry, for general declarations concerning the importance of First Amendment rights do not decide specific cases. To decide this case, the extent of the contribution limits' impingement on First Amendment rights must be weighed against the interests served. Even under strict scrutiny, a narrowly tailored measure may pass constitutional muster when necessary to serve a compelling interest. *Fullilove v. Klutznick*, ... U.S. ....., 48 U.S.L.W. 4979 (July, 1980).

Analysis of the extent to which the contribution limitation implicates freedom of speech must consider its effect on both the contributor and on the recipient. With respect to the contributor, the limitation on the amount that a person may contribute to a political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. *Buckley v. Valeo*, 424 U.S.

at 20-21 (1976). In *Buckley*, the Court set forth the reasons that a contribution limitation only marginally restricts communication, stating:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. *Id.* at 21.

Moreover, the Berkeley ordinance permits persons who might otherwise contribute amounts greater than the statutory limits to spend funds on direct political expression without limitation. Thus, the contribution limitation in no way restricts the contributor's rights to speak himself or to spend funds on political expression. The provision for direct expenditures tends to increase the number of voices participating in an election campaign, thus expanding the range of political expression without reducing the total amount of speech.

The contribution limitation does not restrict any individual's ability to communicate about the measure by becoming actively involved with the campaign. Contributors may render personal services to the campaign committee and may incur limited expenses to support these volunteer services without restriction because volunteer activities and incidental expenses are excluded from the definition of contribution.[3]

As passed by the voters, the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns. After this Court invalidated expenditure limitations in *Buckley v. Valeo,* 424 U.S. 1 (1976), the California Supreme Court invalidated statewide expenditure limitations in ballot measure campaigns. *Citizens for Jobs & Energy v. Fair Political Practices Comm'n,* 16 Cal.3d 671, 129 Cal.Rptr. 106, 547 P.2d 1386 (1976). After these decisions, the City of Berkeley repealed the expenditure limitations, Sections 510-518. Although those sections are quoted in the Appendix to the Jurisdictional Statement at A-77-79, they are not in force and are not at issue in this action.

In summary, the contribution limitation imposes only an incidental impact on the contributor's freedom of speech. It allows the contributor to make contributions totalling $250 in any ballot measure campaign, to make unlimited

---

[3] ". . . The 'contribution' shall not include a gift of service or labor, . . . nor shall the term 'contribution' include a gift of the use of personal or real property where the value of such use is not in excess of $50, nor shall it include food and beverages the value of which for any one event is no more than $50." Ordinance No. 4700-N.S., Section 206.

direct expenditures, and to volunteer his personal efforts without restriction.

The statute's effect on the political speech of the recipient is no greater. Here, as in *Buckley*, the contribution limitation merely "require(s) candidates and political committees to raise funds from a greater number of persons." *Buckely v. Valeo, supra,* at 22. By forcing political committees to broaden their base, the statute has the effect of bringing persons who might otherwise not participate into the political process, thus enhancing First Amendment values.

The limit does not restrict the quantity or content of political speech. The record in this case demonstrates that the ability of CARC, the recipient political committee, to carry on an effective campaign was not impaired by the contribution limitation. The campaign committee developed a budget of just over $100,000 which it believed necessary to carry on an effective campaign. It raised $108,000 from over 1,300 contributors by mid-March 1977, a month before the election. Almost $90,000 was raised from contributors who complied with the statutory limit. Because its budget had been reached, the committee completely ceased fund-raising during the last month of the campaign. Perhaps the clearest indication that the committee was able to communicate its point of view to the electorate effectively is the fact that the rent control measure was defeated.

Contribution limitations also implicate protected associational freedoms. Making a contribution, like joining a political party serves to affiliate a person with a candidate or a cause. In addition, it enables like-minded persons to

pool their resources in furtherance of common political goals. *Buckley v. Valeo, supra,* at 22. However, the impact of Berkeley's ordinance on the associational freedoms of contributors is insubstantial. The contribution limitation leaves the contributor free to become a member of any political committee and to make monetary contributions cumulating $250 to support or oppose any measure. In addition, the contributor may participate personally in all of the campaign committee's efforts relating to the measure. In their jurisdictional statement, appellants describe certain ways in which the $250 contribution limitation allegedly infringes on their associational rights, but because volunteer personal services are not "contributions," most of these activities are not even subject to the contribution limitation.[4] Appellants and all who want to associate with them can engage in research, discuss campaign strategy. poll voters by walking precincts or making telephone calls, coordinate malings and solicit others to contribute funds without restriction. As the California Supreme Court held,

> (Under) the Berkeley Ordinance anyone who wishes to do so may join and work for any committee supporting or opposing a ballot measure. This is the heart of the freedom to associate; no case has held that the right extends so far as to entitle political contributors to dominate such committees and their campaigns by unconstrained financial pressure." J.S. App.at A-16.

---

[4]". . . (S)ection 602 restrains . . . persons from acting in concert to engage in vital campaign activities including the conduct of coordinated research, discussion of campaign strategy, polling of voters, coordination of mailings to voters, purchase of political advertisements and media messages, hiring of skilled campaign management and the solicitation of others to contribute funds." J.S. 10.

Just as the quantity of communication by a contributor does not increase perceptibly with the size of his contribution, *Buckley v. Valeo, supra,* at 21, the amount of associating by a contributor does not increase just because the amount of his contribution increases. An individual who contributes $200 does not associate twice as much as one who contributes $100. In fact, a persuasive argument can be made that the contribution limitations actually increase, rather than restrict, the contributor's right to associate by giving the individual contributor an opportunity to associate with a greater number of persons who have pooled their respective resources in support of a common goal.

B. Governmental Interests

The relatively slight infringement on protected rights of the contributor and the recipient campaign committee must be weighed against the significance of the governmental interests vindicated by the contribution limitation. The California Supreme Court concluded that governmental interests in preserving the integrity of the initiative and referendum are sufficiently weighty to support the contribution limitation.[5] It is undisputed that the state has

---

[5]The California Supreme Court not only held that the ordinance meets the requirements of the First Amendment to the United States Constitution, it also concluded that the contribution limitation vindicates sufficiently important interests under the California Constitution, Article I, Section 2, a provision which the California court has held is "more definitive and inclusive than the First Amendment . . ." *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899, 908, 153 Cal.Rptr. 854, 592 P.2d 341 (1979); *Wilson v. Superior Court,* 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 532 P.2d 116 (1975).

a compelling interest in preserving the integrity of the political process, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government. *United States v. Automobile Workers,* 352 U.S. 567, 570 (1957). The California Supreme Court reviewed the history, purpose and function of the initiative and concluded that the contribution limitation promotes these state interests both directly and indirectly. The limitation directly results in broader public participation in the initiative process by requiring political committees to broaden their base of support to raise funds for a political campaign. In this way, the contribution limitation assures that the initiative will not become a tool of certain vested interests which have substantial amounts of money but almost no broad public support. The limitation also has an indirect impact in that more people will participate in the electoral process if they believe their participation, whether in the form of money or services, is significant. Thus, both directly and indirectly, the contribution limitation serves to promote an active, alert, and responsible citizenry. It protects the electorate's right to exercise the power of direct democracy and to retain control of a legislative process it believed could be dominated by special interests.

The governmental interests accepted by the California Supreme Court as sufficient bases for the contribution limitation are similar to the interests which were recognized but rejected by this Court as inapplicable when it struck down the Massachusetts prohibition on corporate participation in most referendum campaigns. *Bellotti v. First National Bank of Boston,* 435 U.S. 765 (1978). However,

the factual differences between *Bellotti* and the instant case are so significant that *Bellotti* is easily distinguished.

In *Bellotti*, the state statute had substantial impact on protected rights. The statute completely prohibited any corporate participation in a referendum campaign that involved a tax issue or other issue not materially affecting the corporation's business. The statute proscribed not only campaign contributions but also direct expenditures by corporations. The absolute prohibition on contributions denied recipient committees all funding from corporate sources and denied corporate contributors any right to associate through monetary means. In contrast, as described in detail above, the Berkeley ordinance has a very limited impact on protected rights. The Berkeley ordinance treats each person who participates in a ballot measure campaign in the same way. Every "person," whether an individual, association, corporation or any other entity, may make contributions, totaling $250.[6] The Berkeley ordinance permits all entities to make unlimited independent expenditures and to volunteer services in the campaign.

Bellotti and the circuit court decisions *Schwartz v. Romnes*, 495 F. 2d 844 (2d Cir. 1974), and *C & C Plywood Corp. v. Hanson*, 583 F. 2d 421 (9th Cir. 1978), all arose because corporate participation in ballot measure campaigns was completely prohibited. In this case, in which governmental action takes the form of a contribution limitation that allows every entity an equal opportunity to

---

[6]As originally drafted, the Berkeley ordinance did prohibit corporate contributions to ballot measure campaigns but this provision was invalidated. *Pacific Gas and Electric Co. v. City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976).

speak and be heard in the electoral process, the ordinance promotes the compelling governmental interest in the integrity of the electoral process without unduly infringing on protected rights of freedom and association.

C. The Contribution Limitation Is the Least Restrictive Means of Promoting This Interest

Berkeley's contribution limitation is the least restrictive means of vindicating the governmental interest at issue in this case. The $250 limitation on contributions to a ballot measure campaign is narrowly written to focus precisely on the problem. In the words of the California Supreme Court, "large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures." J.S. App. A-17.

The $250 limitation is not unreasonably low. Indeed, it is an amount which allows the majority of contributors to participate in a local campaign with no restriction at all.

Campaign disclosure is also not an adequate protection to the evil sought to be alleviated or prevented by the contribution limitation. When certain interests make large contributions, campaign disclosure merely reinforces the voter's view that the initiative has become a tool of those interests. Thus, campaign disclosure, while serving the salutary goal of public information, does not counteract the problem of voter apathy.

The initiative and referendum were adopted by the voters of California in 1911, shortly after the federal government enacted the prohibition on corporate and labor union participation in candidate campaigns. Both reforms

were adopted because of a belief that government had become a tool of special interests and that the ordinary citizen was disenfranchised by the effect of money on government. Now, some seventy years later, there are widespread indications that the initiative process, intended to return the reins of government to the people, has itself become a tool of special interests. Surely it is within the province of the people, who exercised their right of initiative by adopting the Berkeley Election Reform Act of 1974, to limit contributions to ballot measure campaigns and thereby to preserve and enhance "the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *United States v. Automobile Workers*, 352 U.S. 567, 575 (1957).

II

THIS CASE IS DISTINGUISHABLE FROM LET'S HELP FLORIDA v. McCRARY, 621 F.2d 195 (5th Cir. 1980)

On December 8, 1980, an appeal was filed from the decision of the United States Court of Appeals for the Fifth Circuit in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), appeal pending (No. 80-970, filed December 8, 1980). That decision strikes down a Florida statute limiting contributions in ballot measure campaigns. The Fifth Circuit held that:

> Because campaign contributions implicate important first amendment rights and because Florida has shown no sufficiently important interest to justify restricting the contributions in a referendum election, we affirm the district court decisions declaring these statutory restrictions unconstitutional. 621 F.2d at 197.

There are important factual differences which distinguish this case from the Florida case. With respect to the extent of the infringement on protected interests in *Let's Help Florida* it was undisputed that the contribution limitation prevented the campaign committee from amassing enough funds to carry on an effective campaign. *Let's Help Florida v. Smathers*, 453 F.Supp. 1003, 1011 (N.D. Fla. 1978). In contrast, in this case appellants were able to carry on a successful campaign and did not even actively engage in fund-raising during the last month of the campaign, a period when presumably they would have been able to raise additional funds. J.S. App. A-15. The impact of a contribution limitation on fund-raising is significant and was considered by this Court in *Buckley v. Valeo*, 424 U.S. at 21:

> . . . (C)ontribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. There is no indication however that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations.

Although appellees believe that the cases are distinguishable, appellees urge that if this Court determines to consider the Florida case, it also note probable jurisdiction in the California case. Because of the differences between the Florida statute and the Berkeley ordinance, a decision in the Florida case alone would leave areas of ambiguity, and if this Court determines to consider the issue of contribution limitations in ballot measure cam-

paigns, it should consider all facets of the issue at the same time.

A comparison of the two statutes indicates the differences between them. The California case involves a local ordinance regulating contributions to local elections; the contribution limitation is $250. The Florida statute limits contributions to state and county elections; the limitation is $3,000 and $1,000, respectively. The Berkeley ordinance imposes a limit on the amount contributed in any campaign. The Florida statute apparently limits contributions to a single *committee*. Thus, a contributor could contribute the maximum amount to each committee. *Let's Help Florida v. McCrary, supra,* at 200. The Berkeley ordinance applies only to measures which have qualified for the ballot; the Florida statute applies to both the qualification drive and to the campaign itself. Citizens Against Rent Control is a political committee that carried on a campaign in opposition to a measure that appeared on the ballot in April 1977. Let's Help Florida is a political committee that waged a petition drive under the initiative provisions of the Florida constitution in an effort to place a casino gambling proposal on the ballot in the November 1978 election.

CONCLUSION

For the reasons set forth above, appellees respectfully request that the appeal in this action be dismissed. In the alternative, if probable jurisdiction is noted in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), appeal pending (No. 80-970, filed December 8, 1980), jurisdiction should also be noted here and both cases set for argument in tandem.

Respectfully submitted,

NATALIE E. WEST
City Attorney
CHARLES O. TRIEBEL, JR.
COUNSEL OF RECORD
2180 Milvia Street, Fifth Floor
Berkeley, California 94704
Telephone: (415) 644-6380
Attorneys for Appellees.

Office-Supreme Court, U.S.
FILED
JAN 31 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-737

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OPPOSING MOTION TO DISMISS APPEAL

VIGO G. NIELSEN, JR.
COUNSEL OF RECORD
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940

Attorneys for Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

ARGUMENT

I THE MOTION TO DISMISS APPEAL IS WITHOUT MERIT: A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED . . 1

II THERE IS A DIRECT CONFLICT BETWEEN OPINIONS OF THE CALIFORNIA SUPREME COURT AND UNITED STATES COURT OF APPEALS . 2

III THE ORDINANCE DIRECTLY AND SUBSTANTIALLY AFFECTS THE EXERCISE OF FIRST AMENDMENT RIGHTS. 4

IV THERE IS NO GOVERNMENTAL INTEREST SUFFICIENTLY COMPELLING TO JUSTIFY THE ORDINANCE'S INFRINGEMENT OF CONSTITUTIONAL RIGHTS 6

TABLE OF AUTHORITIES CITED

CASES

Page

Buckley v. Valeo, 424 U.S. 1 (1976) . . . 1,4,5, 6,7

Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980) 3,4

Common Cause v. Harrison Schmitt, [1980] Fed. Election Campaign Financing Guide (CCH) ¶9138 (____ F.Supp. ____, CA No. 80-1609) (D.D.C. Sept. 30, 1980) . 5,6

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). 7

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) 2,3,4

CONSTITUTION

United States Constitution First Amendment 1,2,3, 4,7

ORDINANCES

Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974) Section 602 1

STATUTE

Florida Statutes Section 106.08(1) 3

ARGUMENT

I. THE MOTION TO DISMISS APPEAL IS WITHOUT MERIT: A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

This appeal presents substantial federal constitutional questions of first impression which require resolution by this Court. Appellees have filed a Motion to Dismiss Appeal on the ground that this case does not present such issues. Yet their Motion does not support or even address that point but argues only that the challenged section of the Berkeley ordinance [1] is constitutional. For that reason alone the Motion should be denied.

---

[1] Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974), Section 602.

Moreover, Appellees concede that the ordinance affects fundamental First Amendment rights of speech and association of large numbers of citizens. Motion to Dismiss Appeal, p. 5.

The issue on this appeal is whether there are imminently threatened compelling state interests which are protected by the ordinance so as to justify its admitted infringement of First Amendment rights and whether the ordinance is narrowly drawn to avoid unnecessary abridgement. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). There is no United States Supreme Court opinion which rules directly on this issue. To Appellants' knowledge this is the first opportunity for the Court to

decide this important constitutional question and resolve the direct conflict between the very recent opinions of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit.

This Court has previously decided comparable questions of great import with respect to contributions to and expenditures by candidate campaign committees and corporate contributions and expenditures in ballot measure campaigns. The constitutional issue raised by this appeal is equally important and no less deserving of immediate and ultimate resolution by this Court. The rights of millions of citizens who use and rely on the initiative and referendum processes are now being

illegally restricted by widespread laws limiting contributions to ballot measure campaigns. This serious violation of First Amendment rights now mandates plenary consideration.

II. THERE IS A DIRECT CONFLICT BETWEEN OPINIONS OF THE CALIFORNIA SUPREME COURT AND UNITED STATES COURT OF APPEALS.

Appellees implicitly concede that the opinion of the California Supreme Court in this case is in direct conflict with the recent opinion of the United States Court of Appeals in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980; United States Supreme Court Docket No. 80-969; Appendix to Jurisdictional Statement at A-89 (hereinafter "J.S.App.")),

when they recommend that if plenary review is granted in *McCrary*, it also be undertaken herein. Motion to Dismiss Appeal, p. 5. It is undeniable that the holdings in these opinions are in conflict. In both cases virtually identical governmental interests were advanced to justify the undisputed encroachment on citizens' First Amendment rights. In rejecting the applicability of the proposed governmental interests, the Fifth Circuit unequivocably concluded that "[b]ecause campaign contributions implicate important first amendment rights and because Florida has shown no sufficiently important interest to justify restricting the contributions in a referendum election, we affirm the district court decisions declaring

these statutory restrictions unconstitutional." 621 F.2d at 197; J.S.App. at A-99. The California Supreme Court concluded to the contrary that the challenged contribution "limit is constitutional because it serves compelling governmental interests without unduly infringing upon First Amendment rights." *Citizens Against Rent Control v. City of Berkeley*, 27 Cal.3d 819, 821, 614 P.2d 742, 743, 167 Cal.Rptr. 84, 85 (1980); J.S.App. at A-1.

In actuality, the Berkeley ordinance imposes even greater restrictions on First Amendment rights than the Florida law in that in Berkeley a person's or entity's total contributions in support of or in opposition to a ballot measure may not exceed two

hundred fifty dollars ($250). However, in Florida, a person or entity may apparently contribute the maximum amount ($3000 in state elections, $1000 in county elections) to as many committees as there are on a given side of a referendum issue in a single election (Florida Statutes § 106.08(1)).

The two appellate courts also came to diametrically opposed conclusions respecting the possibility of corruption of the political process by contributions to ballot measure committees:

> With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Let's Help Florida v. McCrary, 621 F.2d at 200, J.S.App at A-98.

> We conclude that the Berkeley ordinance . . . is designed to preserve initiative and referendum elections for the salutary purpose for which they were created, and tends to prevent the corruption of the political process that otherwise results.

Citizens Against Rent Control v. Berkeley, 27 Cal.3d at 830, 641 P.2d at 748, 167 Cal.Rptr. at 90, J.S.App. at A-15.

III. THE ORDINANCE DIRECTLY AND SUBSTANTIALLY AFFECTS FIRST AMENDMENT RIGHTS.

Appellees' reliance on *Buckley* dicta for the proposition that ballot measure contribution limitations only marginally restrict communication and First Amendment rights of speech and

association is misplaced.[2/] The language and analysis quoted by Appellees relates only to contributions to candidate campaigns. It does not pertain to ballot measure elections which were not at issue in *Buckley*. While contributions to candidate campaigns may involve "speech by someone other than the contributor" because such speech is made by the

---

2/ Contrary to the implications of statements in the Motion to Dismiss Appeal, the record below demonstrates with uncontradicted evidence that exercise of Appellants' First Amendment rights was impaired by the ordinance and that CARC's ability to carry on an effective campaign would have been harmed if the Superior Court had not issued a temporary restraining order enjoining enforcement of the Ordinance.

candidate, individuals who contribute to political committees which support or oppose ballot measures necessarily speak directly through such committees.

In *Common Cause v. Harrison Schmitt*, [1980] Fed. Election Campaign Financing Guide (CCH) ¶9138 (___F.Supp. ___, CA No. 80-1609) (D.D.C. Sept. 30, 1980) the court invalidated limitations on expenditures by political committees independent of a presidential candidate as violative of the First Amendment. Although that opinion is not dispositive of the issue at bench, it is instructive with respect to the relationship between a contributor and a candidate (including the

candidate's committee), as contrasted with a contributor and a ballot measure committee. "[S]peech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate)." *Common Cause*, Campaign Financing Guide at 51.073. Candidates may or may not express the sentiments of their contributors on specific issues; "[p]olitical committees, on the other hand, are bound to reify the political thoughts of their member contributors." *Id.* "The communication sponsored by the political committees is the language of their members and contributors

because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. . . . These contributors express themselves through political committees." *Id.*; see also *Buckley v. Valeo*, 424 U.S. at 19. The Berkeley ordinance significantly and directly affects the ability of contributors to ballot measure committees to associate and to express themselves.

IV. THERE IS NO GOVERNMENTAL INTEREST SUFFICIENTLY COMPELLING TO JUSTIFY THE ORDINANCE'S INFRINGEMENT OF CONSTITUTIONAL RIGHTS.

Both the record below and case law are devoid of factual and legal support for the following governmental interests asserted by

Appellees and the Court below as justification for the Ordinance: "to preserve the integrity of the initiative and referendum"; "to sustain the active alert responsibility of the individual citizen in a democracy for the wise conduct of government"; and "to broaden public participation in the initiative process." Motion to Dismiss Appeal, pages 10-13.

Appellees do not dispute the fact that the record below contains no evidence whatsoever that any of these interests are furthered by the ordinance. Nor is there any proof that absent such contribution limitations there would be any imminent danger to the initiative or democratic processes. There is no established, likely or logical nexus between

these interests and application of the ordinance. Thus contrary to the conclusion of the simple majority of the California Supreme Court, the city failed in its burden to establish any compelling governmental interest.

In reality, Appellees' and the California Supreme Court's position is that advocacy may be suppressed merely because it may influence voters. Of course, such assertion is contrary to the express holdings of this Court. *Buckley v. Valeo*, 424 U.S. at 48-49; *First National Bank of Boston v. Bellotti*, 435 U.S. at 790. It is not permissible to restrain campaigning merely because it is effective or to suppress thorough exposure and discussion of issues which may inform

and influence voters. The actual "justification" for the ordinance is an "interest" which is plainly contradictory to the First Amendment.

In conclusion, this case involves important issues of first impression respecting the fundamental rights of citizens to participate in the electoral process. It is respectfully submitted that Appellees' Motion to Dismiss Appeal be denied.

Respectfully submitted,

DATED: January 27, 1981.

DOBBS & NIELSEN
VIGO G. NIELSEN, JR., ESQ.
JAMES R. PARRINELLO, ESQ.
JOHN E. MUELLER, ESQ.

By
VIGO G. NIELSEN, JR.
Attorneys for Appellants

No. 80-737

FILED
DEC 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; and EVA FLOYSTRUP,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

RONALD A. ZUMBRUN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
COUNSEL OF RECORD
CHRISTOPHER H. COLLINS
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae Pacific Legal Foundation

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE ACT INFRINGES ON THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF BERKELEY	4
II. THE ACT SERVES NO COMPELLING GOVERNMENTAL INTEREST	8
III. THE ACT REPRESENTS AN UNDESIRABLE GOVERNMENTAL INTRUSION INTO THE LIVES OF THE CITIZENS OF BERKELEY	11
CONCLUSION	12

TABLE OF AUTHORITIES CITED

	Page
CASES	
Bates v. City of Little Rock, 361 U.S. 516 (1960)	8
Buckley v. Valeo, 424 U.S. 1 (1976)	4-6,8-9, 11
C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978)	2,9
Central Hudson Gas & Electric Corp. v. Public Service Commission, 100 S. Ct. 2343 (1980)	4
Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819 (1980)	7-10
Cohen v. California, 403 U.S. 15 (1971)	4
Consolidated Edison Co. v. Public Service Commission, 100 S. Ct. 2326 (1980)	4
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	4
Erznoznick v. City of Jacksonville, 422 U.S. 205 (1976)	6
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	2,6-12
Griswold v. Connecticut, 381 U.S. 479 (1965)	6
Healy v. James, 408 U.S. 169 (1972)	5
Kusper v. Pontikes, 414 U.S. 51 (1973)	5
Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980)	2,9
Mills v. Alabama, 384 U.S. 214 (1966)	5
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	4
NAACP v. Alabama, 357 U.S. 449 (1958)	5
NAACP v. Button, 371 U.S. 415 (1963)	5
Pell v. Procunier, 417 U.S. 817 (1974)	5
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1964)	4-5
Roth v. United States, 354 U.S. 476 (1957)	5
Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974)	2,9

	Page
Stanley v. Georgia, 394 U.S. 557 (1969)	7,12
Street v. New York, 394 U.S. 576 (1969)	10
Thomas v. Collins, 323 U.S. 516 (1945)	2,11-12
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)	6
United States v. O'Brien, 391 U.S. 367 (1968)	8
Village of Schaumberg v. Citizens for a Better Environment, 100 S. Ct. 826 (1980)	10
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	5
Whitney v. California, 274 U.S. 357 (1927)	5,12
CONSTITUTIONAL PROVISIONS	
United States Constitution, First Amendment	*passim*
United States Constitution, Fourteenth Amendment	4
STATUTES	
Berkeley Election Reform Act of 1974 (Ord. No. 4700-N.S.)	*passim*
TREATISES	
T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966)	11
A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT (1948)	4-5,11
L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)	4,8
LAW REVIEWS	
BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978)	5
Bogen, *Balancing Freedom of Speech*, 38 Md. L. Rev. 387 (1979)	8

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; and EVA FLOYSTRUP,

Appellants,

v.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of appellants. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt organization existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

This action involves the validity of that portion of Berkeley's Election Reform Act of 1974 (Ord. No. 4700-N.S.) (hereinafter Act) which prescribes a $250 maximum on contributions to committees in support of or in opposition to ballot measures. In doing so, the Act deprives the citizens of Berkeley of the ability to effectively join together to convey vital information, as well as to receive such information, so that informed choices can be made on ballot measure issues. The Act represents an unacceptable attempt by the government to control the flow of information necessary for shaping the future of the city. In essence, the Act restricts access by the public to the marketplace of ideas.

PLF is especially concerned as a public interest organization because the Act is representative of attempts by other cities throughout California to control the flow of information necessary for making informed choices on ballot measure issues. *See* Jurisdictional Statement at 21-22. PLF's members, contributors, and supporters who reside in California are directly affected by such limitations. This Court, while recognizing a need for contribution limitations with respect to candidate elections, has rejected the need for contribution limitations with respect to ballot measure elections. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Moreover, three federal circuit courts have seen fit to reject contribution restrictions to committees in ballot measure elections. *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978); *Schwartz v. Romnes*, 495 F.2d 844, 852-53 (2d Cir. 1974).

The courts have historically allowed the widest latitude for discussion and the narrowest range for its restriction. *Thomas v.*

Collins, 323 U.S. 516, 530 (1945). The Act infringes on the First Amendment rights of freedom of speech and association without serving any compelling governmental interest, and represents an undesirable intrusion into the lives of the citizens of Berkeley. Therefore, it is imperative that this Court note probable jurisdiction in this case and reverse the decision of the California Supreme Court.

SUMMARY OF ARGUMENT

The Act infringes on the First Amendment rights of freedom of speech and association. The First Amendment is accorded special protection in the political arena and includes both the right to acquire and disseminate information and the right to join together and make political contributions to advance political, legal, and economic arguments. The Act infringes on the First Amendment rights of the citizens of Berkeley by inhibiting their ability to disseminate and to receive all available information on ballot measure issues.

The stated goal of the Act, in seeking to restrict the speech of some elements of society in order to enhance the relative voice of others, has been rejected by this Court. In addition, the *actual* effect of the Act is contrary to its stated goal and is likewise violative of the First Amendment. Affluent contributors may conduct independent campaigns on ballot measure issues, free from any governmental limitations, while those who cannot afford to do so are limited in the amount they may contribute to ballot measure committees.

The Act serves no compelling governmental interest, and bears no reasonable relation to the achievement of its stated purpose. The reasons given by the California Supreme Court as justification for upholding the Act have been rejected by this Court. As such, the Act unconstitutionally infringes on the First Amendment rights of the citizens of Berkeley.

The Act represents an undesirable intrusion into the lives of the citizens of Berkeley by preventing complete access to the

marketplace of ideas. The California Supreme Court impermissibly endorses the guardianship of the public mind imposed by the Act, and rejects the notion that the public must be permitted to decide for itself matters of important public interest.

ARGUMENT

I

THE ACT INFRINGES ON THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF BERKELEY

The First Amendment to the United States Constitution guarantees in part that "Congress shall make no law ... abridging the freedom of speech ...." This is the most majestic guarantee contained in the Constitution. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-1 (1978). The dissemination of opinions on matters of public interest is an "unalienable right" and is the "matrix, the indispensible condition, of nearly every other form of freedom." *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 145, 149 (1967). This fundamental right has been made applicable to the states by the Fourteenth Amendment. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 100 S. Ct. 2343, 2349 (1980).

The purposes of the First Amendment are stimulation of free discussion and interchange of ideas, *Buckley v. Valeo,* 424 U.S. 1, 14 (1976); protection of the "marketplace of ideas" from governmental infringement, *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1964); and promotion of intelligent self-government in a democratic system, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF GOVERNMENT 88 (1948), in order that "such freedom will ultimately produce a more capable citizenry and more perfect polity." *Cohen v. California,* 403 U.S. 15, 24 (1971). *See Consolidated Edison Co. v. Public Service Commission,* 100 S. Ct. 2326, 2331 (1980).

The First Amendment applies with special force to the political arena. *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). Political expression is afforded the broadest constitutional protection in order to insure the "unfettered inter-

change of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Indeed, it is generally recognized that one of the original purposes of the First Amendment "was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 308 (1978). *See generally* A. MEIKLEJOHN, *supra*. The "freedom to think as you will and to speak as you think" is "indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The protections of the First Amendment include the right of the recipient to acquire information as well as the right of the speaker to disseminate information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976); *Pell v. Procunier*, 417 U.S. 817, 832 (1974). "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas . . . ." *Red Lion Broadcasting*, 395 U.S. at 390.

The First Amendment protects not only freedom of speech, but also freedom of association. Freedom of association has been recognized as a basic constitutional freedom which is closely allied to the freedom of speech and which lies at the foundation of a free society. *Buckley*, 424 U.S. at 25; *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). There can be no doubt that group association enhances the ability to advocate a position or view. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). Freedom of association encompasses the right to join together in a group to advocate political and governmental beliefs, *Healy v. James*, 408 U.S. 169 (1972), and legal and economic interests, *NAACP v. Button*, 371 U.S. 415 (1963). The right to make a political contribution is protected under the First Amendment as a freedom of association. *Buckley*, 424 U.S. at 22.

The general presumption in favor of the constitutional validity of legislation is not applicable in those instances where the legislation is challenged on the ground that it restricts the

preeminent freedoms secured by the First Amendment. *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 215 (1976). Pure speech is entitled to comprehensive protection under the First Amendment. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505-06 (1969). This Court has held that contributions to the political process are a form of pure speech, the limitation of which is deserving of strict scrutiny. *Bellotti*, 435 U.S. at 786 n.23; *Buckley*, 424 U.S. at 16-17. In light of the high purposes served by the First Amendment, the Act must be examined to determine its effects on this preeminent freedom.

The Act unduly infringes on the First Amendment right of the citizens of Berkeley to combine their financial resources in order to disseminate information on ballot measure issues, as well as to receive such information. The Act imposes a "direct quantity restriction[] on political communication and association by persons, groups, . . . and political parties." *Buckley*, 424 U.S. at 18. The effect of the Act is to prevent the citizens of Berkeley from receiving all available information on a given ballot issue in order that they may cast informed votes. This Court has recognized that government "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). The Act also directly affects those who wish to effectively communicate information by restricting the financial ability of individuals to contribute to a committee in support or opposition to a ballot measure issue. "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S at 19.

This Court has on several occasions recognized that the purported goal of acts such as this, which restrict the speech of some elements of society in order to enhance the relative voice of others, "is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. *See Bellotti*, 435 U.S. at 785-86. As such, the Act in this case is constitutionally infirm.

However, the actual effect of the Act is contrary to its stated goal, and in itself is also unconstitutional. Affluent contributors may defeat the purpose of the Act with impunity

by conducting independent campaigns with their own financial resources. The California Supreme Court articulated the problem created by the Act in this case, without recognizing it as such, when it stated that, under the Act, large campaign contributors are free to spend unlimited amounts to conduct their own independent campaigns on ballot measures, but no one may contribute more than $250 to *committees* formed to support or oppose such measures. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 829 (1980). The only remaining alternative for those who cannot afford to underwrite their own independent campaigns on ballot issues is to join together with others of like mind in order to maximize their financial resources. However, the Act precludes these people from contributing more than $250 each to advocate their position. One person alone may spend as much as his personal wealth will allow; two together, however, are limited to $250 apiece.

Citizens who ban together to promote issues which do not concern a large segment of the community, and which therefore cannot generate broad based financial support, are permitted to contribute only a limited amount of their own money in order to further their common interest. It is no answer to say that issues of limited public concern are any less deserving of constitutional protection than more popular issues. In fact, this Court has stated that First Amendment protection is accorded to dissemination of *all* information and ideas regardless of their social worth. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). "The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' " *Bellotti*, 435 U.S. at 790.

In essence, then, while wealthy contributors are not bound by the Act, the actual effect of the Act is to restrict the speech of small campaign contributors who must pool their financial resources to further their common goal. The Act thereby enhances the relative voice of those large independent contributors who can afford to conduct their own campaigns free of the Act's prohibition. This is likewise constitutionally impermissible. First Amendment protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public

discussion. *Buckley*, 424 U.S. at 49. *See Citizens Against Rent Control*, 27 Cal. 3d at 834 (Richardson, J., dissenting).

The Act infringes on the First Amendment rights of the citizens of Berkeley. In order for such infringement to be constitutionally permissible, the Act must serve a compelling governmental interest. As discussed more fully below, the Act does not serve any such compelling interest, and therefore violates the First Amendment.

II

THE ACT SERVES NO COMPELLING GOVERNMENTAL INTEREST

Limitations on contributions to the political process are subject to strict scrutiny under the First Amendment. In order for the City of Berkeley to properly infringe on the constitutionally protected freedom of speech of its citizens, the city must demonstrate the existence of a compelling governmental interest. "Even then, the [city] must employ means 'closely drawn to avoid unnecessary abridgment.' " *Bellotti*, 435 U.S. at 786. Further, when, as here, "it is shown that governmental action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960). This is a burden which the City of Berkeley cannot meet. Moreover, the actual effect of the Act is the opposite of what the city is seeking to accomplish.

In this case, the Court must examine, on the one hand, "the extent to which communicative activity is in fact inhibited" by the Act, "and on the other hand, the values, interests or rights served by enforcing the inhibition." L. TRIBE, *supra* at § 12-20. The restriction must be no greater than necessary to achieve the stated governmental interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See* Bogen, *Balancing Freedom of Speech*, 38 Md. L. Rev. 387 (1979).

The reasoning of the California Supreme Court in upholding the constitutionality of the Act is a study in self-contradiction. The values allegedly served by the Act, as found by that court, are the prevention of perversion of the political process by large contributors and a reversal of the trend in voter apathy caused by such large contributions. The court cited *Buckley* for the proposition that the contribution limitation imposed by the Act "focuses precisely on the problem" the Act is purported to solve. *Citizens Against Rent Control*, 27 Cal. 3d at 831. However, the justification for upholding the contribution limitation in *Buckley* was the prevention of political corruption of *candidates* for elective office and the avoidance of a *quid pro quo* relationship. This Court recognized in *Bellotti* that the potential for corruption which exists in candidate elections simply does not exist with regard to ballot measures—while a candidate may be corrupted by the payment of money, there is plainly no one capable of being so corrupted with regard to ballot measures. *Bellotti*, 435 U.S. at 790-91. *See Let's Help Florida*, 621 F.2d at 199-200; *C & C Plywood Corp.*, 583 F.2d at 423, 425; *Schwartz*, 495 F.2d at 852-53.

The California Supreme Court then reasoned that the Act is necessary because "domination of the political process by large contributors leaves other citizens with a stilled voice in the very domain of our electoral system set aside for accomplishing the popular will," and leads to voter apathy. *Citizens Against Rent Control*, 27 Cal. 3d at 826-28. This is precisely the scheme permitted under the Act. Wealthy contributors may conduct their own independent campaigns free from any governmental limitation and subject only to the depth of their pockets. Those who cannot afford to conduct their own independent campaigns, and who must join together with others to maximize their financial clout, are limited in the amount of money they are permitted to contribute to committee efforts. The application of the Act will obviously still the voices of all but the wealthy and will lead to achieving that which it was designed to prevent.

In a further twist of logic, the California Supreme Court cited *Bellotti* with regard to the importance of the compelling state interests of "preserving the electoral process, preventing

corruption, and sustain[ing] the alert responsibility of the individual citizen in a democracy . . ." *Bellotti*, 435 U.S. at 788-89, yet recognized that in *Bellotti* this Court *declined* to find that the statute furthered the above goals absent a showing by record evidence that corporations corrupt the political process. Similarly, in *this* case there was *no* evidence before the California Supreme Court that the corruption which the Act was designed to counter in fact existed. *Citizens Against Rent Control*, 27 Cal. 3d at 835 (Richardson, J., dissenting). The court relied upon the speculation of political scientists, commentators, and students. *Id.* at 828-29.

While attempting to slay the imaginary dragons of political corruption and voter apathy, the Act instead serves to trample underfoot the constitutional rights of the citizens of Berkeley, by allowing the wealthy an unlimited right to express themselves on ballot measures, while permitting those who cannot afford to do so to instead contribute only a limited amount to political committees to express their views. The Act clearly serves no compelling governmental interest, and in fact runs contrary to the goals which it purportedly seeks to achieve.

In the pursuit of its legitimate interests, the city must employ "narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumberg v. Citizens for a Better Environment*, 100 S. Ct. 826, 836 (1980). If there is no nexus between the means used to regulate the activity and the legitimate ends of the regulation, the court may disregard the ends as justification for the challenged law. *E.g., Street v. New York*, 394 U.S. 576 (1969). The Act in this case is overly broad in scope and unnecessarily interferes with the First Amendment rights of the citizens of Berkeley. Further, there is no reasonable relation between the stated goals of the Act and the means employed to reach those stated goals. Because the Act serves no compelling governmental interest, it represents an unconstitutional infringement on First Amendment rights.

III

THE ACT REPRESENTS AN UNDESIRABLE GOVERNMENTAL INTRUSION INTO THE LIVES OF THE CITIZENS OF BERKELEY

The Act represents an unnecessary and undesirable intrusion into the lives of the citizens of Berkeley. As such, it constitutes an unwarranted infringement of their First Amendment rights and is therefore unconstitutional.

This Court has recognized that "contribution restrictions could have a severe impact on political dialogue if the limitation prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The same holds true for contribution restrictions to committees for ballot measure issues. The Act prevents complete access by the citizens of Berkeley to the marketplace of ideas in order that they can make informed decisions on ballot measure issues, after having heard as much information on the issues as the competing sides have to offer. What is essential under the First Amendment "is not that everyone shall speak, but that everything worth saying shall be said." A. MEIKLEJOHN, *supra* at 25. This insures that sound and rational judgments can be achieved "by considering all arguments which can be made to support or oppose any propositions." T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 7 (1966).

The decision of the California Supreme Court impermissibly allows the city to assume a guardianship of the public mind. *Thomas*, 323 U.S. at 545. The Court speaks of the sanctity of the ballot initiative process, which gives the public the opportunity for direct political decision making, yet it condones a scheme which limits the ability of the citizenry to effectively exercise that opportunity. In essense, the court feels that it is important to open up the political process to the public, but that the process should not be opened too far. This Court recently recognized that the First Amendment prohibits the "government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 784.

"The direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources.' " *Bellotti*, 435 U.S. at 790 n.29.

The citizens of Berkeley must be entrusted to decide for themselves the merits of the arguments put before them on issues of public interest. "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They valued liberty both as an end and as a means. . . ." *Whitney*, 274 U.S. at 335 (Brandeis, J., concurring). The enactment of the Act presupposes that the messages of large contributors must be kept from the citizens of the city, for fear that they may be influenced. The fact that advocacy may persuade the electorate is hardly a reason to suppress it. *Bellotti*, 435 U.S. at 790. Further, the "right to receive information and ideas regardless of their social worth, [citations omitted], is fundamental to our free society." *Stanley*, 394 U.S. at 564. In rejecting on First Amendment grounds the highly paternalistic nature of the state statute in question in *Bellotti*, this Court recognized that

> "The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment." *Bellotti*, 435 U.S. at 791-92.

CONCLUSION

"[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the truth from the false for us." *Thomas*, 323 U.S. at 545. The decision of the California Supreme Court in this case conflicts with the views of this Court and of three federal Courts of Appeals. The Act violates the First Amendment rights of the

citizens of Berkeley and constitutes an unreasonable governmental intrusion into their lives. Therefore, Pacific Legal Foundation urges that the Court note probable jurisdiction in this case and reverse the decision of the California Supreme Court.

Respectfully submitted,

RONALD A. ZUMBRUN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
COUNSEL OF RECORD
CHRISTOPHER H. COLLINS
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae
Pacific Legal Foundation

December, 1980

Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' BRIEF

VIGO G. NIELSEN, JR.
Counsel of Record
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Appellants

QUESTIONS PRESENTED FOR REVIEW

1. Does a Berkeley ordinance which limits the amount one can contribute to campaign committees supporting or opposing a ballot measure in an election campaign violate the First Amendment to the United States Constitution?

2. Do ballot measure contribution limits serve any imminently threatened and compelling governmental interest?

3. Can the ordinance's admitted infringement of the rights of speech and association be upheld if appellees failed to meet their burden of establishing the existence of a compelling and imminently threatened governmental interest?

PARTIES TO THIS APPEAL

Appellants Citizens Against Rent Control/Coalition for Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California nonprofit association; Betty Geritz; Muriel Rosenkranz; and Eva Floystrup were plaintiffs and appellees in the courts below. Appellees City of Berkeley, California, a municipal corporation; the Berkeley City Council; the Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission, were defendants and appellants in the courts below. There were no other parties.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THIS APPEAL	i
OPINIONS BELOW	2
JURISDICTIONAL BASIS	2
RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
A. Limitations on Contributions to Ballot Measure Campaigns Are Direct and Substantial Restraints upon the Exercise of First Amendment Rights of Political Speech and Association	8
1. In Contrast to Candidate Contribution Limits, Ballot Measure Contribution Limits Directly Curtail Free and Open Debate of Issues of Public Importance	11
B. Since Section 602 Restrains the Exercise of Fundamental Rights, It Is Subject to the Strictest Judicial Scrutiny and Can Be Sustained Only if Berkeley Convincingly Demonstrates That Contribution Limits Advance a Legitimate and Imminently Threatened Governmental Interest by the Least Burdensome Means Available	14
C. Limits on Contributions to Ballot Measure Campaigns Do Not Further Any Imminently Threatened and Compelling Governmental Interest	16
1. Preventing the Corruption of Candidates for Public Office Is Not a Compelling Interest in a Ballot Measure Campaign	16
2. Limiting Contributions to Equalize Political Communication Is Not a Compelling or Legitimate Governmental Interest in a Ballot Measure Campaign	17
3. Large Contributions to Ballot Measure Campaigns Do Not Imminently Threaten Citizens' Confidence in Government or the Integrity of the Electoral Process	18
CONCLUSION	34

TABLE OF AUTHORITIES CITED

CASES — PAGE

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976) 22

Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal.Rptr. 465 (1976) 27

Buckley v. Valeo, 424 U.S. 1 (1976) 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 31

C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) 17, 21

Citizens Against Rent Control v. City of Berkeley, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980) 2, 17, 23, 24

Citizens Against Rent Control v. City of Berkeley, 99 Cal.App. 3d 736, 160 Cal.Rptr. 448 (1979) 2, 21, 33

Citizens for Jobs and Energy v. Fair Political Practices Commission, 16 Cal.3d 671, 547 P.2d 1386, 129 Cal.Rptr. 106 (1976) 31

Coates v. City of Cincinnati, 402 U.S. 611 (1971) 3

Consolidated Edison Company v. Public Service Commission, __U.S. __, 100 S.Ct. 2326 (1980) 14

Elrod v. Burns, 427 U.S. 347 (1976) 15

Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975) 3

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) .. 10, 14, 15, 18, 19, 24, 25, 30

Frias v. Board of Trustees of Ector County, 584 S.W.2d 944 (Tex. Civ. App. 1979) 22

Garrison v. Louisiana, 379 U.S. 64 (1964) 8

Healy v. James, 408 U.S. 169 (1972) 10

King Mfg. Co. v. City Council of Augusta, 277 U.S. 100 (1928). 3

Kusper v. Pontikes, 414 U.S. 51 (1973) 10

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980), *appeal docketed* No. 80-970 (Dec. 8, 1980) 11, 17, 22, 23

Miami Herald Publishing Co., Division of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974) 23, 24

Mills v. Alabama, 384 U.S. 214 (1965) 8

NAACP v. Alabama, 357 U.S. 449 (1958) 10, 14

NAACP v. Button, 371 U.S. 415 (1963) 10, 15

Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976) 31

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 29

Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) 17, 19, 20

Shelton v. Tucker, 364 U.S. 479 (1960) 14

Sherbert v. Verner, 374 U.S. 398 (1963) 14

Thomas v. Collins, 323 U.S. 516 (1945) 15

PAGE

United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) 25

CONSTITUTIONS, STATUTES, AND ORDINANCES

U.S. CONST. amend. I 2, 3, 7, 8, 9, 10 11, 12, 14, 15, 24, 26, 30, 33, 34

CAL. CONST.
Art. II § 8(a-b) 9
Art. II § 9(a-b) 9
28 U.S.C. § 1257(2) (1976) 3
CAL. ELEC. CODE (Deering)
Section 29622 29
Section 29795 29
CAL. GOV'T CODE (Deering)
Section 81008 28
Section 84200 28
Section 84211 28
Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974)
Section 112 28
Section 217 4
Section 219 ..... 3, 7
Section 412(g) 28
Section 602 ..... 2, 3, 4, 5, 6, 7, 8, 14 15, 16, 18, 19, 24, 30, 31, 32, 33, 34, 35
Section 604 ..... 4, 5
Section 700 4
Berkeley City Charter, article XVIII (Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372) and amendments to art. V 27
Berkeley, Cal., Berkeley Renter Property Tax Relief Ordinance of 1978 27
Berkeley, Cal., Berkeley Rent Stabilization and Eviction for Good Cause Ordinance (June 3, 1980) 27

BOOKS, PAMPHLETS AND PERIODICALS

Brestoff, N., *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 922 (1975) 26
GREGG, J., NEWSPAPER ENDORSEMENTS AND LOCAL ELECTIONS IN CALIFORNIA (1966) 26
Hamilton, H., *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124 (March 1970) 26, 28
Henderson, T. and W. Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes*, 17 AM. J. POL. SCI. 695 (1973) 26

PAGE

KEY, V. O., JR., POLITICS, PARTIES, AND PRESSURE GROUPS (5th ed. 1967) 29

Lee, E., *California*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (D. Butler and A. Ranney eds. 1978). 26

NEW YORK SENATE RESEARCH SERVICE TASK FORCE ON CRITICAL PROBLEMS, THE POPULAR INTEREST VERSUS THE PUBLIC INTEREST . . . A REPORT ON THE POPULAR INITIATIVE (1979) ... 28

Note, *Corporate Contributions to Ballot Measure Campaigns*, 6 U. MICH. J.L. REF. 781 (1973) 29

Ranney, A., *The United States of America*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (D. Butler and A. Ranney eds. 1978) 11, 28

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (4th ed. 1951) 9

DURBIN T., INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 81-63A, 751/110 CONGRESSIONAL RESEARCH SERVICE (1981) 11

DURBIN, T., INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 76-95A, 597/110 (updated by R. A. Reimer 1976) and R.A. REIMER, ADDENDUM I (1977) CONGRESSIONAL RESEARCH SERVICE 11

48 F.C.C.2d 1, FAIRNESS REP. (1974) 29

[Jan. 12, 1981] 2 THE INITIATIVE NEWS REPORT No. 1 (INITIATIVE NEWS SERVICE) 28

Magleby, D., Direct Legislation: Voting on Ballot Propositions in the United States (1980) (unpublished dissertation available at Alderman Library, U. of Va.) 26, 28

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

VS.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

Appellants CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; and EVA FLOYSTRUP, submit their brief supporting their appeal of the decision of the Supreme Court of California.

OPINION BELOW

The opinion of the California Supreme Court is cited as *Citizens Against Rent Control* v. *City of Berkeley*, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion appears at page A-1 of the Appendix to Jurisdictional Statement (J.S. App.) filed herein on November 6, 1980.

The opinion of the California Court of Appeal was cited (until vacated) as *Citizens Against Rent Control* v. *City of Berkeley*, 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979). The opinion appears in the J.S. App. at A-32.

JURISDICTIONAL BASIS

(i) On April 6, 1977, appellants filed suit for declaratory and injunctive relief in the Superior Court of California in and for the County of Alameda. The complaint challenged the validity, under the first amendment to the Federal Constitution, of section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) (the Ordinance),[1] which prohibited a donor from contributing more than $250 to campaign committees supporting or opposing a measure on the Berkeley municipal ballot. The superior court immediately issued a temporary restraining order and six days later a preliminary injunction against enforcement of section 602.[2] In August of 1977 on final hearing, the superior court granted summary judgment for appellants holding section 602 unconstitutional.[3] The California Court of Appeal, First Appellate District, Division Two, unanimously affirmed the trial court. The California Supreme Court in a 4 to 3 decision, reversed the courts below and sustained the validity of section 602 against appellants' constitutional attack.

---

[1] Unless otherwise indicated, all references to "sections" are to sections of the Ordinance; the Ordinance appears in the J.S. App. at A-53.

[2] The Temporary Restraining Order and Order Sustaining Application for Preliminary Injunction appear at pages 50 and 52, respectively, of the Joint Appendix (Jt. App.).

[3] The Order Granting Summary Judgment, the Judgment, and the Notice of Entry of Judgment appear in the J.S. App. at A-48, 50 and 52, respectively.

(ii) The judgment of the California Supreme Court was rendered on August 7, 1980. Appellants filed their notice of appeal in the California Supreme Court on October 28, 1980.[4]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2) (1976), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erzoznik* v. *City of Jacksonville*, 442 U.S. 205, 207 n.3 (1975); *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100 (1928); *see Coates* v. *City of Cincinnati*, 402 U.S. 611, 612 (1971).

RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE

The relevant constitutional provision is the First Amendment to the United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the Berkeley Ordinance are:

> Section 602: No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).
>
> Section 219: "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company corporation, association, committee, and any other organization or group of persons acting in concert.

[4] A copy of the Notice of Appeal appears in the J.S. App. at A-100.

Section 217: "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Section 604: If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Section 700: Any person who knowingly or willfully violates any provision of this ordinance is guilty of a misdemeanor punishable by a fine for each violation of three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

STATEMENT OF THE CASE

At each stage of the proceedings below, appellants contended that section 602 impermissibly violated appellants' fundamental rights of speech and association, did not further any compelling governmental interest, and that no such interest was (or could be) demonstrated by appellees (hereinafter sometimes referred to as "Berkeley") in the context of ballot measure campaigns.

At the April 19, 1977 Berkeley municipal election, Berkeley voters were asked to vote on Measure B which, if adopted, would have imposed a complex system of rent controls upon thousands of rental units in Berkeley.[5] Measure B was controversial and groups of citizens formed to campaign

[5] The text of Measure B, consisting of approximately 5400 words, is reproduced in the Clerk's Transcript on Appeal (C.T.) at 113-16.

for and against its passage. Approximately 1,300 citizens formed an unincorporated association (a campaign committee) organized in accordance with the Ordinance and California election law, to oppose the passage of Measure B; they called themselves Citizens Against Rent Control (CARC) which is an appellant herein.[6] CARC solicited and accepted campaign contributions, hired an experienced campaign consultant, engaged in extensive research on the effects of rent control, published campaign literature and generally conducted an active campaign against Measure B.[7] Supporters of Measure B likewise conducted an active, far-reaching and intensive campaign.[8]

Prior to the election, a controversy arose concerning Berkeley's intent to enforce the $250 contribution limit contained in section 602. Appellants believed that the City had publicly declared that it was *not* going to enforce section 602 and in reliance thereon, CARC solicited and received $18,600 in contributions above the $250 limit; it is also undisputed that appellants Mason-McDuffie, a Berkeley real estate firm, and the Berkeley Board of Realtors (composed of 450 members) made contributions to CARC of $1,000 and $5,000, respectively.[9] Twenty days before the election, appellee, The Berkeley Fair Campaign Practices Commission, ordered CARC immediately to surrender the $18,600 to the City treasury, pursuant to section 604 of the Ordinance.[10] Appellants, faced with the loss of badly needed funds at the most crucial juncture of an important election campaign, filed suit and obtained injunctions against enforcement of sections 602 and 604 and utilized the $18,600 during the last days of their campaign. Measure B was rejected by the voters on election day. Since CARC incurred an $8,000 campaign debt, appellants amended their complaint below to seek the right to collect amounts greater than $250 to retire the debt after the election.[11]

---

[6] Jt. App. at 2, 32.
[7] Jt. App. at 31-35.
[8] Jt. App. at 5, 6, 34.
[9] Jt. App. at 23-24, 26, 30, 33.
[10] *See* Declaration of Edythe Campbell, J.S. App. at A-88.
[11] Jt. App. at 54-56.

Appellants shared a common belief that Measure B should be defeated. They believed that Measure B would severely diminish the value of Berkeley real property (including their own), interfere with the conduct of their businesses and create serious social and economic problems in the City, including elimination and/or deterioration of rental units, reduction of available housing and diminution of the City's tax base. They believed that the most effective way to communicate their beliefs to the Berkeley electorate was to join together and pool their resources through contributions to CARC, which would conduct and coordinate an organized research and campaign effort.[12]

Appellants submitted uncontroverted evidence below that the $18,600 was necessary to conduct an effective campaign against Measure B in the weeks before election day; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the uncertainty caused by section 602; that to communicate effectively the ill effects of the proposed rent control law embodied in Measure B, expensive research and voter contact had to be conducted (for example, appellants produced uncontroverted evidence that the cost of a mailing to each of the 71,088 registered voters in Berkeley was approximately $12,800); and that experienced campaign personnel had to be hired.[13]

The only evidence offered by appellees at any stage of the proceedings below was the Declaration of Edythe Campbell, Berkeley City Clerk.[14] This declaration merely stated that appellee, The Berkeley Fair Campaign Practices Commission, had demanded that CARC surrender the $18,600. It contained no proof or offer of proof of any compelling governmental interest to justify section 602.

SUMMARY OF ARGUMENT

This case presents the question of whether limits on the amount a person or entity can contribute to ballot measure

[12] Jt. App. at 5-6, 25-35.
[13] Jt. App. at 6-7, 9, 11-13, 32-35.
[14] J.S. App. at A-84-88.

campaigns are constitutional. The applicable method of analysis and, ultimately, the answer to the question are enunciated in prior decisions of this Court which were ignored by the state court below.

The challenged Berkeley Ordinance limits to $250 the total amount of money a "person"[15] can contribute to all committees supporting or opposing a ballot measure in a municipal election and subjects violators to misdemeanor prosecution.

The making of a campaign contribution constitutes an exercise of the rights of speech and association protected by the first amendment. Section 602 imposes substantial restraints on the exercise of those rights in two ways. First, it restricts the quantity and effectiveness of speech and association of persons who desire to campaign together to express their opinions in support of or in opposition to a ballot measure. Second, it limits political debate and the flow of information and ideas to the voting public, thus imposing a form of quantitative censorship which prevents the citizenry from receiving and evaluating all available information about an issue of public importance.

Since section 602 infringes on the exercise of fundamental first amendment rights, it is subject to the closest judicial scrutiny. Section 602 may be sustained only if appellees can meet their burden to demonstrate that a) there is a legitimate purpose and compelling governmental interest served by the contribution limit; b) the interest is imminently threatened; c) there is a nexus between the contribution limit and protecting the interest; and d) the contribution limit is the least restrictive means of protecting the interest.

Prior decisions of this Court, as well as opinions of the Second and Ninth Circuits and the Michigan Supreme Court show that ballot measure contribution limits further no compelling governmental interests and cannot survive close scrutiny. Moreover, the decision under appeal directly conflicts with a contemporaneous decision of the Court of Appeals for the Fifth Circuit which invalidated virtually identical ballot measure contribution limits in the State of Florida.

---

[15] Section 219 defines "person" to include individuals, partnerships, syndicates, business trusts, company corporations, associations and any other group of persons acting in concert. J.S. App. at A-63.

The state court opinion is a substantial and unwarranted departure from fundamental first amendment principles. At its core is the theory that too much information in a public debate on a political issue is pernicious because it may persuade the voters to vote in a certain way. The state court theorized (in the absence of any record evidence) that such alleged "domination" of public opinion leaves some citizens with stilled voices and potentially perverts the election process. These very justifications have been expressly rejected by this Court and others as not being legitimate or sufficiently compelling to warrant governmental restrictions on the rights of citizens to speak and associate in a ballot measure campaign or to receive all information available concerning the issues under debate.

Appellants respectfully submit that the decision of the California Supreme Court should be reversed and section 602 should be declared unconstitutional.

ARGUMENT

A. Limitations on Contributions to Ballot Measure Campaigns Are Direct and Substantial Restraints upon the Exercise of First Amendment Rights of Political Speech and Association.

First amendment protection extends to political activity including public debate concerning candidates for elective office, issues of public importance, and all matters relating to the political processes. *See Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1965). Discussion of public issues is integral to our system of government and "the First Amendment affords the broadest protection to such political expression. . . ." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

In reaction to the 1972 election campaign and ensuing national concern over Watergate, many jurisdictions attempted to regulate the amount of money spent in election campaigns.

Although enacted primarily to remedy abuses caused when large contributors gain influence over candidates for public office, such legislation in some instances has regulated "issue" campaigns, commonly referred to as ballot measures, direct legislation, popular legislation, initiatives and referenda[16] (hereinafter collectively referred to as "ballot measures").

Public debate on ballot measures embodies the discussion of important issues in one of its most democratic forms. There are two principal ways in which the citizenry exercises first amendment rights by the spending of money in ballot measure campaigns. The interested citizen may pool his or her money or assets with others by making a "contribution" to an organized campaign committee (such as CARC), or the person may make an "expenditure" of money independent of other persons and campaign committees for such purposes as informational mailings, campaign posters and newspaper or media advertising.

A citizen's contribution of money to an election campaign committee is a form of protected political speech. *See Buckley* v. *Valeo,* 424 U.S. at 14. First amendment protections also apply to the rights of campaign committees to receive and expend funds as money is necessary to pay for research and political communications that are vital to conduct contemporary campaigns.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

---

[16] The initiative is the power of the people to propose laws and/or constitutional amendments independent of the legislature. An initiative is generally proposed by presenting to the designated state official a petition which sets forth the text of the proposed law or amendment and is signed by the required number of voters. *See* BLACK'S LAW DICTIONARY 923 (4th ed. 1951); CAL. CONST. art. II, § 8(a-b).

The referendum is the power of the people to approve or reject statutes that would otherwise become law. A referendum is also proposed by a petition presented to a designated state official and signed by the requisite number of voters. *See* BLACK'S LAW DICTIONARY 1446 (4th ed. 1951); CAL. CONST. art. II, § 9(a-b).

> This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. *Valeo*, 424 U.S. at 19 (footnote omitted). "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' " *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 n.23 (1978) (citations omitted).

Limits on contributions to campaign committees such as CARC infringe on citizens' right to associate as well as to speak. The first amendment protects the right of citizens to associate freely to advocate as a group, political and governmental beliefs and to assert legal and economic interests. *See Healy* v. *James*, 408 U.S. 169 (1972); *NAACP* v. *Button*, 371 U.S. 415 (1963). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973).

Freedom of association, recognized as a separate and distinct constitutional right in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), has become increasingly important in modern times when, in order to have an effective voice, individuals or groups find it necessary to join with others to express mutual concerns and to pursue common goals. As stated in *NAACP* v. *Alabama*, 357 U.S. at 460, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . ."

In *Buckley* this Court affirmed that the making of contributions to an election campaign committee is an exercise of the right of association. *Buckley* v. *Valeo*, 424 U.S. at 24-25. "The

right to make political contributions is protected under the first amendment as an important freedom of association." *Let's Help Florida* v. *McCrary,* 621 F.2d 195, 199 (5th Cir. 1980), *appeal docketed,* No. 80-970 (Dec. 8, 1980). Thus limits on contributions to campaign committees necessarily restrict the association and pooling of resources of the committees' supporters and members.

1. In Contrast to Candidate Contribution Limits, Ballot Measure Contribution Limits Directly Curtail Free and Open Debate of Issues of Public Importance.

Limitations on a citizen's right to make campaign contributions "operate in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo,* 424 U.S. at 14, particularly in ballot measure elections, where citizens participate directly in the enactment or rejection of legislation by voting on a particular issue at the polling place. Every state except Delaware (not to mention thousands of local governments) provides for such popular decision-making.[17]

Appellees and the state court below failed to apprehend the fundamental and constitutionally significant differences in the nature, purpose, conduct and effect of ballot measure and candidate campaigns. The most significant difference is obvious: the election of a candidate versus the enactment of legislation. Issue elections involve direct participatory democracy by the citizenry, whereas candidate elections involve representative democracy in which the officeholder legislates as the citizen's elected representative.

Unlike the election of a candidate, who usually cannot place all of his or her programs into effect immediately (or sometimes at all), the results of an issue election are immediate. If a ballot measure is approved, it usually results in the enactment of a law with simultaneous impact on the citizenry. Often ballot measures propose legislation which has a direct

[17] A. Ranney, *The United States of America,* in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 69-73 (D. Butler and A. Ranney eds. 1978) (hereinafter Ranney, *The United States of America*). *See generally* T. DURBIN, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 81-63A, 751/110 CONGRESSIONAL RESEARCH SERVICE (1981); T. DURBIN, INITIATIVE, REFERENDUM AND RECALL: A RESUME OF STATE PROVISIONS, REP. NO. 76-95A, 597/110 (updated by R. A. Reimer 1976) and R. A. REIMER, ADDENDUM I (1977) CONGRESSIONAL RESEARCH SERVICE.

and immediate financial, social or cultural impact on certain segments of the community. As previously mentioned, Measure B submitted to the Berkeley electorate in this case, if adopted, would have enacted a severe system of rent controls in Berkeley which appellants believed would significantly reduce property and business values, eliminate housing stock and cause negative social and economic effects in the city. When the outcome of public debate on issues will have such direct effects, it is crucial to protect the free exercise of first amendment rights.

The role of contributors differs significantly with respect to candidate and ballot measure elections. Candidates speak out on many issues that affect our lives and environment, but rarely share common views and opinions on all important issues with those who support their campaigns with monetary contributions (or votes). If given the opportunity, a candidate and his or her supporters would not speak with one voice on every issue. Candidates are free to use the entire contribution to further their candidacy in any way they deem best, even if it includes communicating views on subjects about which they and their contributors disagree.

Citizens usually support a candidate out of a general respect for the person's integrity, honesty, intelligence and philosophy, or even out of a dislike or mistrust of his or her opponent. A contributor to a candidate's campaign expresses general support for the candidate but has no control over the focus or content of the candidate's political speech which the contribution enhances. Thus, this Court correctly observed in *Buckley* that contributions to a candidate's campaign serve as a "general expression of support" for the candidate and that since the amount contributed is only a "rough index of the intensity of the contributor's support," candidate contribution limits are only a "marginal restriction" upon the contributor's political communication. 424 U.S. at 20-21.

Appellees and the state court below mistakenly embrace the above-quoted language in contending that limits on contributions to ballot measure campaigns are likewise only "marginal restrictions" on speech. In contrast to candidate campaigns,

a contribution to a ballot measure campaign committee directly promotes and enhances the view of the contributor for or against the issue under debate. Issue elections provide the voters with only two choices: yes or no. While contributors to a ballot measure campaign committee do not necessarily control the specific manner in which their money will be spent, they know that it will be used to communicate their beliefs on a single issue. This distinction was summarized by the California Court of Appeal below:

> A candidate is likely to have opinions on more than one subject; thus any contribution to him will be "undifferentiated" to the extent that it cannot be allocated for the candidate's use contingent upon his espousal of a particular point of view on a particular issue. Obviously, the situation is entirely different when a contribution is made to an entity dedicated to a single issue. To the extent that a contribution is made to such an issue-oriented body, the situation is not likely to fall within the purview of the *Buckley* court's statement that "the transformation of contributions into political debate involves speech by someone other than the contributor." . . . There is a tighter nexus between a contributor and a one-issue organization, and a greater likelihood that the contribution will be used as the contributor wishes than is the case with the attenuated relationship between a contributor and a political candidate who is obliged to take a position on more than one issue.

Citizens Against Rent Control v. *City of Berkeley*, 99 Cal.App.3d 736, 744-45, 160 Cal.Rptr. 448, 453 (1979); J.S. App. at A-42 (citation omitted). Contributions in ballot measure campaigns are not merely "undifferentiated symbolic acts," but directly and substantially express the contributor's opinion with respect to a single issue of public importance.

Campaign contribution limits restrict associational rights and thereby diminish the effectiveness of political speech. CARC is an unincorporated association of appellants and others who desired to campaign together in opposition to Measure B. In order to conduct such an effort with its

inevitable expense, many persons contributed money to CARC which became the voice that expressed the belief of its members that Measure B should be rejected. Such association is particularly important in a ballot measure election where there is no candidate to speak and focus public attention on campaign issues, and often the only effective advocate that can be heard is a campaign committee. Contribution limits obviously affect the ability and right of contributors to associate, to act and to communicate their beliefs effectively. *See Buckley* v. *Valeo*, 424 U.S. at 22.

An equally important corollary to the right of citizens to speak and associate is that all citizens are entitled to hear the speech of others, particularly when the speech communicates thoughts and ideas on issues of public importance. For better or worse, it takes money to speak in our contemporary society, and any limit on the amount of money one may contribute to a ballot measure campaign committee necessarily limits the quantity of public debate and diminishes the flow of information to the citizenry. Limits on contributions to ballot measure committees impose direct and substantial restraints upon the exercise of the fundamental first amendment freedoms of speech and association.

B. Since Section 602 Restrains the Exercise of Fundamental Rights, It Is Subject to the Strictest Judicial Scrutiny and Can Be Sustained Only if Berkeley Convincingly Demonstrates That Contribution Limits Advance a Legitimate and Imminently Threatened Governmental Interest by the Least Burdensome Means Available.

A strict test must be applied when first amendment rights are affected. Where, as here, an ordinance infringes upon the exercise of the fundamental rights of speech and association, it "is subject to the closest scrutiny." *Buckley* v. *Valeo*, 424 U.S. at 25 (quoting *NAACP* v. *Alabama*, 357 U.S. at 460-61); *Consolidated Edison Company* v. *Public Service Commission*, ___U.S.___, 100 S.Ct. 2326 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786; *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). Section 602 can be sustained only upon a convincing demonstration that it furthers a compelling governmental interest and "the burden is

on the government to show the existence of such an interest." *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *NAACP* v. *Button*, 371 U.S. at 438-39. A mere showing of the existence of a legitimate and paramount governmental interest is insufficient. Berkeley must also demonstrate that the interest is imminently threatened and that the suppression of speech and association is necessary to and does protect such interest from the threat. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). "Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment. . . .' " of first amendment rights. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786 (quoting *Buckley* v. *Valeo*, 424 U.S. at 25).

The relevant considerations in determining whether section 602 can survive strict scrutiny, can be paraphrased as follows: (1) Does section 602 seek to achieve a legitimate governmental interest? (2) Is the interest compelling? (3) Is the interest imminently threatened by the exercise of speech and/or association? (4) Is there a nexus between the contribution limit and the interest; in other words, does section 602 actually serve, other than randomly, an imminently threatened, compelling interest? (5) Does section 602 employ means which infringe as little as necessary upon freedom of expression and association? Berkeley must demonstrate convincingly that section 602 satisfies all of these tests.

Although purporting to subject section 602 to strict scrutiny, the state court fundamentally altered the standard of review set forth in *Buckley* and *Bellotti*. In reality, it engaged in a balancing test, weighing Berkeley's interest in protecting the initiative process against what it postulated as section 602's "marginal" encroachment on appellants' first amendment rights. Even if the state court was correct that section 602 was a marginal restriction on first amendment rights, it was still required to apply strict scrutiny instead of the balancing test which eliminated Berkeley's burden to demonstrate a compelling governmental interest and an imminent threat to such interest.

C. Limits on Contributions to Ballot Measure Campaigns Do Not Further Any Imminently Threatened and Compelling Governmental Interest.

Berkeley failed to demonstrate the existence of an imminently threatened, compelling governmental interest which is served by section 602; nor is such a demonstration possible in the context of a ballot measure campaign. Although only the gravest abuses endangering paramount interests of government can justify curtailment of first amendment rights, appellees failed to offer any evidence below of an interest which even arguably compels upholding the contribution limit. Nevertheless, the state court ignored the only evidence before it and upheld section 602.

1. Preventing the Corruption of Candidates for Public Office Is Not a Compelling Interest in a Ballot Measure Campaign.

The governmental interest in preventing the appearance or reality of corruption of candidates for public office has no application to a ballot measure election. *Buckley* held only that the prevention of corruption and of the appearance of corruption of candidates and officeholders created by the real or perceived influence of large contributors was the compelling governmental interest which justified candidate contribution limits.

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Buckley v. *Valeo*, 424 U.S. at 26-27 (footnote omitted).

Appellees and the state court contended that the *Buckley* rationale regarding corruption applied to allow limits on contributions to ballot measure campaigns. However, this contention ignores the fundamental differences between candidate and ballot measure campaigns and the narrow and well-defined reasoning of *Buckley*, which focused on the improper influence that large contributions have or appear to have on public officeholders to undermine the proper functioning of representative democracy. Since there are no candidates in ballot measure campaigns, which embody direct rather than representative democracy, the *Buckley* rationale is irrelevant in the context of a ballot measure campaign. *Schwartz* v. *Romnes*, 495 F.2d 844, 852-53 (2d Cir. 1974); *C & C Plywood Corp.* v. *Hanson*, 583 F.2d 421, 425 (9th Cir. 1978); *Let's Help Florida* v. *McCrary*, 621 F.2d at 199-200.

2. Limiting Contributions to Equalize Political Communication Is Not a Compelling or Legitimate Governmental Interest in a Ballot Measure Campaign.

The majority opinion below is largely grounded in the theory that contributions of large amounts of money in a ballot measure campaign may be limited in order to equalize political communication and thus presumably to enhance the relative voice of the less wealthy. The state court postulated that "the domination of these [electoral] processes by large contributors leaves other citizens with a stilled voice. . . ." 27 Cal.3d at 826-27, 614 P.2d at 746, 167 Cal.Rptr. at 88; J.S. App. at A-9-10. This concept has been rejected by this Court as a compelling or legitimate interest and is no justification for ballot measure contribution limits.

In striking down expenditure limits, *Buckley* specifically rejected the argument that government may limit political communications of the wealthy so as to augment the ability of others to influence the outcome of elections.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest

> possible dissemination of information from diverse and antagonistic sources,' " and " 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *New York Times Co.* v. *Sullivan, supra,* at 266, 269, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945), and *Roth* v. *United States,* 354 U.S., at 484.

Buckley v. *Valeo,* 424 U.S. at 48-49.

Buckley and *Bellotti* hold that the fundamental rights of speech and association of some may not be restricted in order to enhance the relative voice of others. The state court attempted to distinguish *Bellotti* on the ground that section 602 is less restrictive than the Massachusetts law that prohibited corporate contributions and expenditures in ballot measure campaigns. This factual difference, however, is constitutionally meaningless in terms of the strict scrutiny standard. It is irrelevant whether a law's infringement of first amendment rights is total or partial if there is no compelling governmental interest to justify the infringement. *Bellotti* nowhere even suggests that its result is based on the law's total prohibition of contributions. Such contributions simply posed no demonstrated or demonstrable danger to the election process and hence no compelling governmental interest was or could be established. The same is true here.

3. Large Contributions to Ballot Measure Campaigns Do Not Imminently Threaten Citizens' Confidence in Government or the Integrity of the Electoral Process.

The state court held that large contributions threaten and potentially pervert or corrupt the electoral process, which allegedly results when citizens' confidence in government is destroyed because they come to believe that only money makes a difference in determining the outcome of ballot measure elections. When distilled, the principal components of the decision are that: a) the side that spends the most money prevails; b) the public is misled by the political communications of selfish special interest groups and votes as instructed by such groups; and c) voter apathy in ballot measure campaigns inevitably results.

The state court sought to bolster these unfounded theories by reference to a commentator on the political scene, a political scientist's opinion published twenty years ago, and a study of a Colorado ballot measure. Such flimsy data was the only basis upon which the majority below upheld section 602. While some may find these theories and the authorities relied on by the court interesting, they are not the hard evidence necessary to survive strict scrutiny. Moreover, these theories are of questionable validity and represent only one of many points of view on the role and effect of money in ballot measure election campaigns.

a. The State Court Opinion Conflicts with All Relevant Precedent.

The conclusion of the state court that large contributions to a ballot measure campaign threaten and potentially pervert or corrupt the electoral process is in conflict with virtually every other appellate court opinion to address this and closely related issues. In speculating that large contributions have such *potential*, the majority below failed to reconcile *Bellotti* and other cases which have rejected the notion that the prevention of perversion or corruption is a compelling interest in ballot measure campaigns.

Bellotti which invalidated a Massachusetts law prohibiting corporate contributions and expenditures in ballot measure campaigns concluded that there is no risk of corruption in such campaigns. *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 789-90. As previously indicated, appellees cannot rely on *Buckley* which based its holding on the undue influence that large contributions appear to have on candidates and officeholders.

The holding of the majority below is also inconsistent with decisions of the Second, Fifth and Ninth Circuits and courts of other states. In *Schwartz* v. *Romnes*, 495 F.2d 844, the Court of Appeals for the Second Circuit rejected the assertion that prevention of corruption or perversion is a compelling governmental interest in a ballot measure election.

> Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributor's special interest. Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, *it is difficult to see how such motivation would play any substantial role in an attempt to influence votes for or against a referendum. The public remains completely free to reject the views of the corporate contributor, just as it did in the present case, without fear or retribution or non-support by the corporate contributor.*

Id. at 851 (emphasis added).

The *Schwartz* court also dismissed the appearance-of-corruption argument with respect to ballot measure contributions:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.

Id. at 852-53.

The Ninth Circuit applied similar reasoning in striking down a Montana statute that prohibited corporate contributions in support of or in opposition to ballot measures:

> The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. *When corporations seek to influence the electorate and not an individual candidate*

> *or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in Buckley. . . .*
>
> *That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech.*

C & C Plywood Corp. v. *Hanson,* 583 F.2d at 425 (citation omitted, emphasis added).

The three justices of the California Court of Appeal below unanimously shared the view of the Second and Ninth Circuits.

> [D]efendants insist that section 602 of the Berkeley Election Reform Act of 1974 is justified by Berkeley's interest in obviating the "*mere appearances* of political corruption. . . ." This contention is patently unfounded. Such an interest, within the context of participation by issue-oriented committees in the electoral process, cannot be accepted as legitimate, nor is it cognizable as "compelling."

Citizens Against Rent Control v. *City of Berkeley,* 99 Cal.App.3d at 742, 160 Cal.Rptr. at 452 (original emphasis); J.S. App. at A-38-39.

> We conclude that defendants can advance no interest sufficient to justify section 602's restrictions on protected First Amendment liberties. Quite the contrary, their case demonstrates compelling reasons why this type of expression should not be limited.

Id. at 745, 160 Cal.Rptr. at 453; J.S. App. at A-43.

In an advisory opinion in response to certified questions from the state legislature, the Michigan Supreme Court expressed its view that prohibitions on corporate expenditures or contributions with respect to ballot measures were unconstitutional.

> We believe a significant distinction exists between corporation contributions or expenditures made for the purpose of influencing the nomination or election of a candidate and, on the other hand, corporate contributions

> or expenditures made for the purpose of expressing a position or opinion concerning a public issue which may include the qualification, passage or defeat of a ballot question. . . .
>
> Contributions or expenditures by corporations to communicate their positions or opinions concerning ballot questions serve to enlighten the public and encourage an informed decision-making process. Such contributions or expenditures create no danger of incurring obligations from an elected official to a major contributor. The right of the public to be informed is a paramount consideration in seeking to preserve the free exchange of ideas in the market place.
>
> A ballot question may affect the assets, the conduct, or, indeed, the very existence of a corporation. Especially in such cases, the corporation is deserving of a public forum to express its position or opinion, much the same as the public has a right to hear those same matters.

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3, 14-15 (1976) (footnotes omitted). *See also Frias* v. *Board Trustees of Ector County*, 584 S.W.2d 944 (Tex. Civ. App. 1979).

Just four weeks prior to the filing of the decision below, the Court of Appeals for the Fifth Circuit held that there is no threat of corruption or perversion which could be abated by limits on contributions to ballot measure campaigns. *Let's Help Florida* v. *McCrary*, 621 F.2d 195, invalidated a Florida law that limited contributions to statewide and county ballot measure campaign committees to $3,000 and $1,000, respectively. The Fifth Circuit unanimously rejected the governmental interest in preventing corruption or perversion as being compelling in a ballot measure campaign.

> When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one

> group or another do not influence the political decision-makers—in this case, the voters themselves—except in a manner protected by the first amendment. . . . With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

Let's Help Florida v. *McCrary*, 621 F.2d at 199-200; J.S. App. at A-96-98. Although its decision directly conflicted with *Let's Help Florida*, the majority below inexplicably failed even to mention the case (the dissent did take note of it, *Citizens Against Rent Control* v. *City of Berkeley*, 27 Cal. 3d at 836-37, 614 P.2d at 752-53, 167 Cal.Rptr. at 94-95 (Richardson, J. dissenting); J.S. App. at A-25-26).

Berkeley's unsubstantiated assertion that contribution limits are necessary to prevent dominant voices from unduly influencing public opinion is also inconsistent with *Miami Herald Publishing Co., Division of Knight Newspapers, Inc.* v. *Tornillo*, 418 U.S. 241 (1974), which rejected similar contentions when it considered the validity of legislation compelling newspapers to allow candidates to reply to editorials. Florida asserted that the press had "become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events," that economic factors had "made entry into the marketplace of ideas served by the print media almost impossible" to less affluent competing points of view, that "[t]he result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion" and that the public had "lost any ability to respond or contribute in a meaningful way to the debate on issues." *Id.* at 249-51. These arguments, analogous to Berkeley's, were rejected in *Miami Herald Publishing*. "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256. As Justice White said in his concurring opinion:

> Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain

> intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.
>
> . . .
>
> Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed. . . .

Id. at 259-60 (White, J. concurring) (footnotes omitted).

Much like Florida in *Miami Herald Publishing*, Berkeley seeks to promote an electorate unencumbered by the thoughts of dominant voices. But unlike Florida's right-of-reply statute, the Berkeley contribution limit does not even have the virtue of directly promoting this goal. Section 602's effect is to reduce political debate to a low common denominator, which is inimical to the first amendment's purpose of securing the widest possible dissemination of ideas.

The state court also hypothesized that the alleged dominant influence of large amounts of money causes "voters [to] lose confidence in our governmental system if they come to believe that only the power of money makes a difference." 27 Cal.3d at 827-28, 614 P.2d at 747, 167 Cal.Rptr. at 89; J.S. App. at A-11. Similarly, in *Bellotti*, Massachusetts asserted as compelling "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 787. Rejecting this argument, this Court stated:

> Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the

> people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. Cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. Cf. *Wood* v. *Georgia*, 370 U.S. 375, 388 (1962).
>
> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, ... simply is not present in a popular vote on a public issue.

Id. at 789-90 (citations and footnote omitted).

Perhaps the most eloquent answer to the argument that undue influence over the voters justifies limits on free and full political communication was written by Justice Rutledge in a concurring opinion in *United States* v. *Congress of Industrial Organizations*, 335 U.S. 106 (1948):

> For "undue influence" in this connection may represent no more than convincing weight or argument fully presented, which is the very thing the Amendment and the electoral process it protects were intended to bring out. And one may question how far legislators may go in accurately assessing undue or disproportionate weight as distinguished from making substantially accurate findings and conclusions concerning corruption.

Id. at 144-45 (Rutledge, J., concurring).

In essence the theme underlying the state court's factually unsubstantiated argument concerning loss of confidence is

again, that government may restrict political debate so that certain interests do not dominate or unduly influence public opinion. This Court and others have expressly rejected the contention that the ability of persons to influence the outcome of elections through political communication and advocacy corrupts or perverts the electoral system.

b. Contributions Do Not Corrupt or Pervert Ballot Measure Campaigns.

Sound reasoning as well as common knowledge support the numerous appellate court decisions which reject the theory that political communication corrupts or perverts the electoral process. Moreover, the state court's unequivocal conclusion that campaign contributions diminish voters' confidence in government by fostering the belief that only money determines the outcome of issue elections, is a disputed and unsubstantiated theory insufficient to justify curtailment of first amendment freedoms.

Political science studies and articles on ballot measure election results reach conflicting conclusions about the significance and impact of money and reveal almost as many opinions as there are authors. Yet on one point almost all authors agree: the spending of money is *but one* of many factors that influence the way a citizen votes. Other important voter influences are endorsements by public figures, organizations, newspapers, and radio and television stations, the length and complexity of the issue, the timing of candidate elections, and the voter's personal ideology, party affiliation and cultural and socio-economic background.[18] Indeed, all the data below on the effects of

[18] *See, e.g.*, E. Lee, *California*, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 101-20 (D. Butler & A. Ranney eds. 1978) (hereinafter Lee, *California*); H. Hamilton, *Direct Legislation: Some Implications of Open Housing Referenda*, 64 AM. POL. SCI. REV. 124, 127-29, 132-36 (March 1970) (hereinafter Hamilton, *Direct Legislation*); J. GREGG, NEWSPAPER ENDORSEMENTS AND LOCAL ELECTIONS IN CALIFORNIA 27 (1966); T. Henderson and W. Rosenbaum, *Prospects for Consolidating Local Government: The Role of Elites in Electoral Outcomes*, 17 AM. J. POL. SCI. 695 (1973); N. Brestoff, *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 922, 934-42 (1975); D. Magleby, Direct Legislation: Voting on Ballot Propositions in the United States 18-20, 248-81, 300-31, 344-50 (1980) (unpublished dissertation available at Alderman Library, U. of Va.) (hereinafter Magleby, Direct Legislation).

money in ballot measure campaigns was offered by appellants and showed that with respect to 28 controversial California state ballot measures between 1954 and 1974, the side that spent the most money won only 50% of the time. Jt. App. at 15-17.

The theory that large contributions cause or have caused voter apathy and diminish faith in the initiative process is also without the benefit of evidence.[19] A brief history of rent control elections in Berkeley is to the contrary. In 1972, Berkeley voters adopted the City's first rent control law, Berkeley City Charter, art. XVII (Stats. 1972 (Reg. Sess.) res. ch. 96, p. 3372) and amendments to article V. Shortly after that law was declared unconstitutional in *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 550 P.2d 1001, 130 Cal.Rptr. 465 (1976), proponents of rent control put Measure B on the April 19, 1977 ballot (proposed amendment to Berkeley City Charter, arts. V and XVII), the campaign giving rise to this lawsuit. When Measure B was defeated, the proponents again qualified a rent control initiative for the November 7, 1978 ballot, Measure I, the Renter Property Tax Relief Ordinance of 1978 (expired Dec. 30, 1979), which the Berkeley voters passed into law. On June 3, 1980, the Berkeley voters adopted a stronger rent control law, Measure D, the Rent Stabilization and Eviction for Good Cause Ordinance. There were no contribution limits in effect during any of these four election campaigns. Despite this fact, rent control measures were placed on the municipal ballot four times in a period of eight years and were adopted into law by the voters three out of four times. Thus, it can hardly be said that Berkeley voters were apathetic, unduly influenced or dominated by special interests opposed to rent control or that they had lost confidence in the integrity of the initiative process as a result of large contributions.

[19] The state court articulated no basis for its assertion that voter apathy was increasing in ballot measure elections; indeed studies show that voter interest in and use of ballot measures has increased significantly in recent years. *See* note 20, *infra*.

The questionable theories of several commentators constituted the sole basis for the state court's willingness to permit Berkeley to curtail appellants' rights of political communication and association. Had the court below looked at those states and local jurisdictions where direct legislation is permitted or contemplated, it would have found conclusions and opinions strikingly different from those of the commentators who have predestined the demise of popular democracy through direct legislation. The frequency of use, the unpredictability of outcome and the increasing public interest in the ballot measure process give substantial credence to the conclusion that direct legislation is alive and well in America and enjoying great voter confidence.[20]

Perhaps the vitality of the direct legislative process is partly due to existing legislation that has been enacted to protect electoral integrity and to instill voter confidence by means that do not restrict the flow of communication and debate. For example, California and Berkeley laws require periodic, timely and local public disclosure of contributions to and expenditures by ballot measure campaign committees prior to an election. CAL. GOV'T CODE §§ 84200 and 84211 (Deering). Such information is readily available to the public, CAL. GOV'T CODE § 81008 (Deering), and is regularly reported in newspapers and other media. Campaign committee disclosure reports required by section 412(g) of the Ordinance must contain the identity, address, occupation and employer of all contributors of $50 or more and section 112 further requires that the City publish this information in local newspapers twice before each election.

---

[20] *See* Ranney, *The United States of America*, *supra* note 17, at 69-73; Lee, *California*, *supra* note 18, at 90-91; [Jan. 12, 1981] 2 THE INITIATIVE NEWS REPORT, No. 1 (INITIATIVE NEWS SERVICE) 4-8; NEW YORK SENATE RESEARCH SERVICE TASK FORCE ON CRITICAL PROBLEMS, THE POPULAR INTEREST VERSUS THE PUBLIC INTEREST . . . A REPORT ON THE POPULAR INITIATIVE 10-14, 31 (1979); *see generally* Magleby, Direct Legislation, *supra* note 18, at 62, 110-13, 358-64, 405-06. "Since the inception of direct legislation in 1989 there have been over 17,000 statewide propositions. . . ." *Id.* at 110. *See also* Hamilton, *Direct Legislation*, *supra* note 18, at 125. There is no accurate account of the number of issues on local ballots but academic experts estimate that there may be 10,000 to 15,000 annually. Ranney, *The United States of America*, *supra* note 17, at 73.

There are numerous other ways that government can protect the electoral process without limiting political debate. California Elections Code section 29795 imposes a fiduciary duty on persons who form ballot measure committees by requiring them to act as trustees of all contributions and to use such funds only for expenditures directly related to that ballot measure. Also, the Federal Communications Commission's Fairness Doctrine requires all radio and television stations to provide coverage of ballot measure campaigns in a fair manner and to provide free time to advocates of one position if necessary to restore fair coverage if it is unbalanced due to advertising purchased by the opposition. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969); 48 F.C.C.2d 1, FAIRNESS REP. (1974). Contrary to the implication of the majority below, that the purchase of ballot measure elections is equivalent to the purchase of a candidate for public office, California Elections Code section 29622 prohibits the use of campaign funds to purchase votes in ballot measure elections.

The state court apparently was concerned that special interest groups allegedly threaten ballot measure campaigns and it implied that their participation in campaigns indicates a malignancy in the democratic process. Yet, the suggestion that advocacy by special interest groups is inconsistent with our democratic process ignores the foundation and operation of our democracy. It is persons grouped together to promote or oppose ballot measures or other issues of public importance who are in fact the special interests seen by the majority below to be a harmful influence. By promoting political debate and communication, such groups actually advance the proper functioning of government.[21]

---

[21] *See* V. O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 130 (5th ed. 1967): "The view that pressure groups are pathological growths in the body politic is likewise more picturesque than accurate. A safer assumption is that groups developed to fill gaps in the political system." Note, *Corporate Contributions to Ballot Measure Campaigns*, 6 U. MICH. J.L. REF. 781, 786 (1973): "A pattern of association for political purposes pervades American politics. Theorists may point to individual participation in politics as a basic element of a pluralistic democratic society, but individual values are successfully achieved in politics by group action. In initiative campaigns especially, interest group involvement is important to the proper functioning of the political process. . . . Interest groups inform the electorate of how the enforcement of particular measures would affect them, allowing voters to balance competing claims."

c. There Is No Imminent Threat to the Integrity of the Initiative or Electoral Process.

Section 602 was improperly sustained solely upon the thesis that large contributions to a ballot measure campaign may *potentially* pervert or corrupt the electoral process at some undefined future date. However, assuming that contribution limits did serve a compelling governmental interest, that interest must be *imminently threatened* in order for the strict scrutiny requirements to be satisfied. *First National Bank of Boston* v. *Belloti*, 435 U.S. at 789.

Appellees offered no evidence and the majority below did not conclude that large contributions pose an imminent threat to the electoral process. The state court thus departed from the requirement that the government demonstrate the existence of an imminently threatened and compelling interest.

d. There Is No Nexus Between Section 602's Restriction of Political Communication and Any Legitimate Governmental Interest.

There is no nexus or direct relationship between restrictions on the quantity of political debate and potential perversion of the democratic processes, and the court below failed to articulate one. Limits on contributions to ballot measure campaigns only serve randomly, if at all, the interest of preservation of the integrity of the electoral process.

The theme underlying the state court's opinion is that large contributions result in one-sided campaigns virtually assuring the success of wealthy advocates, silencing the voices of others, and causing voter apathy. Yet the exercise of first amendment rights could in no way corrupt or appear to corrupt the electoral process, but could serve only to increase political communication and debate regarding the ballot measure. The voters remain free to evaluate and then either accept or reject the political arguments. The state court in actuality was concerned that appellants' speech would persuade the voters and affect the outcome of ballot measure elections, rather than corrupt or pervert the initiative process. "But the fact that advocacy may persuade the electorate is hardly reason to suppress it." *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 790.

Even assuming that the spending of large sums of money for political communication creates an apathetic electorate, contribution limits do not rectify that problem. Persons or entities who desire to spend large amounts of money in support of or in opposition to a ballot measure are at liberty to do so as long as they do it independently of others because expenditure limits are unconstitutional whether they relate to ballot measure or candidate elections. *Buckley* v. *Valeo*, 424 U.S. at 51; *Citizens for Jobs and Energy* v. *FPPC*, 16 C[illegible]d 671, 675, 547 P.2d 1386, 1388, 129 Cal.Rptr. 106, 108 (1976); *see Pacific Gas and Electric Co.* v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976). Thus the operative effect of the contribution limit when combined with the right to make unlimited independent expenditures, is not to limit money spent for political communication but rather to force persons who desire to spend any sums in excess of $250 to act independently of each other. If voter confidence in the electoral process is diminished by large sums of money being spent for political communication, the state court failed to articulate how large contributions are more harmful than large expenditures in the context of a ballot measure campaign.[22]

By concluding that less political communication enhances voter interest and confidence in government, the state court embraced an unsubstantiated thesis of debatable validity. Section 602's actual effect is to reduce the vitality and quantity of political debate and is contrary to the first amendment's purpose of securing the widest possible dissemination of ideas

[22] The state court did not address this issue but purported to yield such a "value judgment" to legislative determination. J.S. App. at A-16. The court's position, however, ignores previous decisions that have not left that determination to the legislature. Buckley v. Valeo, 424 U.S. 1 (1976); Citizens for Jobs and Energy v. FPPC, 16 Cal. 3d 671, 547 P.2d 1386, 129 Cal.Rptr. 106 (1976); Pacific Gas & Electric Co. v. City of Berkeley, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976). On the basis of these precedents, the City of Berkeley acknowledged that the expenditure limits contained in sections 513-14 of the Ordinance, J.S. App. at A-78, were unconstitutional and unenforceable, J.S. App. at A-53.

in order to promote an alert and informed citizenry. As a consequence, section 602 is more likely to discourage voter participation and interest than to enhance it.

Section 602 accomplishes nothing other than to restrict political advocacy. The purpose of contribution limits in candidate campaigns is to prevent the candidate from receiving, and the donor from giving, so much money as to corrupt or appear to corrupt a future holder of public office. It is the "tainted" money which is the source of evil, not the speech which is made possible thereby. In contrast to candidate contribution limits, the purpose of ballot measure contribution limits is to attempt to equalize the effectiveness of political communications by restricting public debate regarding issues submitted directly to the voters. The former is an attempt to protect the voters from corruption of their elected officials, while the latter is an attempt to curtail speech designed to inform the voters. Put another way, candidate contribution limits seek to limit undue influence which might prevent the voters' wishes from in fact being carried out by their elected representatives, while ballot measure contribution limits attempt to restrain effective speech and advocacy which might inform and thereby influence the voters.

By sanctioning a limit on the amount of political debate, the state court essentially held that the citizenry was incapable of listening to and evaluating the merits and demerits of ballot measure issues. Besides betraying a basic mistrust of the intelligence of the electorate, the state court allows Berkeley to assume a guardianship of the public mind, restricting the quantity, flow and effectiveness of political communication so as allegedly to prevent the City's electorate from being confused and misled. This paternalistic attitude assumes that restricting public debate is permissible in order to help the citizenry make wise decisions. The fallacy of this reasoning was well stated by the Court of Appeal below:

> One of the principal reasons for making a contribution is to persuade. It is true that many people fear that unlimited expenditures by large corporations or by wealthy individuals will not add to the electorate's edification, but

> will instead inundate the electorate with material which is slanted and misleading. We believe that to accept this premise is to slander the intelligence of the voters. Assuming that the sources of contributions are disclosed, as is required under the Berkeley legislation, a contribution limitation evidences a fundamental distrust of the voters' ability to recognize campaigning by special interest advocates within the context of an issue-oriented election. Such a paternalistic attitude is repugnant to the First Amendment: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced, . . . it is a danger contemplated by the Framers of the First Amendment." (*First National Bank of Boston* v. *Bellotti, supra*, 435 U.S. 765, 791-792.)

Citizens Against Rent Control v. *City of Berkeley*, 99 Cal.App.3d at 746, 160 Cal.Rptr. at 454; J.S. App. at A-44-45.

There is no nexus between section 602 and any legitimate, let alone compelling, governmental interest. Limits on contributions to ballot measure campaigns serve only to restrict political communication in an attempt to equalize the voices of all sides of the issue. This is simply not sufficient to uphold section 602.

e. The Decision Below Dangerously Implicates Other Exercises of First Amendment Rights.

In accepting the superficially attractive argument that large contributions for political communication are bad, the state court decision may affect related first amendment liberties. While ballot measure campaigns allow the public to decide directly certain issues of public importance, other issues are decided indirectly by the citizenry.

In the past twenty years there have been many controversial and fundamental social and political issues decided in large part after the expenditure of millions of dollars by one side or the other for the purpose of influencing public opinion. Large scale advertising, direct mail and organizational campaigns have been conducted by proponents or opponents of issues such as civil rights, women's rights, the war in Vietnam, the right to bear firearms, and the "right to life." In many of the national, state and local publicity campaigns involving these and other vital issues, one side or special interest group has heavily outspent its opposition to influence public opinion and, indirectly, governmental action. The rationale by which the court below upheld restrictions on public debate over a ballot measure could be extended to permit limits on political communication and association concerning non-ballot measure issues. This simply shows one of the potential dangers created by the unorthodox decision under appeal which sanctions direct restriction of political communication.

CONCLUSION

The drafters of the Berkeley Ordinance ignored fundamental precepts of our political and governmental system. They apparently assumed that monetary contributions to enhance public debate can be evil, and failed to acknowledge that political communication is protected by our Constitution. As a consequence, section 602 limits the ability of citizens to pool their resources to campaign effectively in a ballot measure election and infringes on the fundamental first amendment rights of speech and association, as well as the right of citizens to receive all information available on issues of public importance.

Appellees failed to demonstrate the existence of a compelling governmental interest to justify section 602; nor is such a demonstration possible in the context of a ballot measure campaign. As acknowledged in the reasoning and opinions of this Court and those of the Second, Fifth and Ninth Circuits, there is no imminently threatened governmental interest that is or could be served by limits on contributions to ballot measure campaigns. Hence there is no justification for section 602.

The decision of the state court is grounded in a misapprehension of the proper role of government as a would-be protector of the public from what are perceived to be dominant influences cloaked in the veil of monetary wealth. Such governmental paternalism, benevolent and well-intentioned as it may be, must not be allowed to intrude upon the vital, free marketplace of ideas crucial to the democratic election process. The voting public should and must be allowed to form its own conclusions based upon all available information.

It is respectfully submitted that the decision of the California Supreme Court be reversed and section 602 be declared unconstitutional.

Respectfully submitted,

VIGO G. NIELSEN, JR.
Counsel of Record
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Attorneys for Appellants

Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; BARBARA BERNSTEIN, ILSE BRIEGER, PETER COHON, STUART GARDINER, MILTON GORDON, GARY GRESHER, JUDITH LEFKOWITZ and STEVEN MAYER as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEES BRIEF

NATALIE E. WEST
City Attorney
Counsel of Record
CHARLES O. TRIEBEL, JR.
2180 Milvia St.
Fifth Floor
Berkeley, CA 94704
(415) 644-6380
Attorneys for Appellees.

STEVEN L. MAYER
650 California St.
Suite 2900
San Francisco, CA 94108
(415) 434-1600

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Voter Apathy And The Role Of The Initiative In California Political History	7
II. The Berkeley Contribution Limitation Has A Marginal Impact On The Exercise Of Speech And Associational Freedoms	13
III. The Berkeley Ordinance Serves The Compelling Governmental Interest Of Preserving The Integrity Of And Public Confidence In The Initiative	18
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977)	16
Associated Homebuilders v. *City of Livermore*, 18 Cal.3d 582, 135 Cal. Rptr. 41, 557 P.2d 473 (1976)	19
Bates v. *Little Rock*, 361 U.S. 516 (1960)	25
Bishop v. *City of San Jose*, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1971)	12
Branti v. *Finkel*, 445 U.S. 507 (1980)	16
Brown v. *Superior Court (Citizens Against the Street and Road Tax Trap)*, 5 Cal.3d 509, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971)	22
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2, 5, 8, 11 14, 15, 18, 20 21, 24, 25
California Medical Association v. *Federal Election Commission*, ____U.S.L.W.____ (June 26, 1981)	14, 16, 17, 25
Canon v. *Justice Court*, 61 Cal.2d 446, 39 Cal. Rptr. 228, 393 P.2d 428 (1964)	22
Citizens Against Rent Control v. *City of Berkeley* 27 Cal.3d 819, 167 Cal. Rptr. 84, 614 P.2d 742 (1980)	5, 16
C&C Plywood Corp. v. *Hanson*, 583 F.2d 421 (9th Cir. 1978)	19, 23
Citizens for Jobs and Energy v. *Fair Political Practices Commission*, 16 Cal. 3d 671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976)	2, 11, 12, 24

CASES — PAGE

Cohen v. *California*, 403 U.S. 15 (1971) 20
Fair Political Practices Commission v. *Superior Court (Institute of Governmental Advocates)*, 25 Cal.3d 33, 157 Cal. Rptr. 855, 599 P.2d 46 (1979) 19
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 5, 18, 19
Frias v. *Board of Trustees of Ector County*, 584 S.W.2d 944 (Tex.Civ.App. 1979) 23
Gayle v. *Hamm*, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1978) 8
Hardie v. *Eu*, 18 Cal. 3d 371, 134 Cal. Rptr. 201, 556 P.2d 301 (1976) 12, 24
Let's Help Florida v. *McCrary*, 621 F.2d 195 (5th Cir. 1980), *appeal docketed*, No. 80-970 (Dec. 8, 1980) 19, 22, 23
Let's Help Florida v. *Smathers*, 453 F. Supp. 1003 (N.D. Fla. 1978) 23
McRae v. *Califano*, 491 F. Supp. 630, 715 (1980) 15
Mervynne v. *Acker*, 189 Cal. App.2d 558, 11 Cal. Rptr. 340 (1961) 19
Miami Herald Publishing Company v. *Tornillo*, 418 U.S. 241 (1974) 21
Mills v. *Alabama*, 384 U.S. 214 (1966) 20
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958) 17
Ohralik v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978) 17
Pacific Gas & Electric Co. v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976) 2
In re Primus, 436 U.S. 412 (1978) 17
Roth v. *United States*, 354 U.S. 476 (1957) 9
Schwartz v. *Romnes*, 495 F.2d 844 (2d Cir. 1974) 23
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 20

CODES

CALIFORNIA ELECTIONS CODE
Section 22808 12
CALIFORNIA GOVERNMENT CODE
Sections 12900 et seq. 22
Sections 81000 et seq. 11
Section 81001(a) 12
Section 81002(b) 11
Sections 84100 et seq. 21
Section 84305 21
FLORIDA STATUTES ANNOTATED
Section 106.08(1)(d)(e) 22

Acts

Federal Campaign Act 16

Ordinances

Berkeley Ordinance No. 4700-N.S. 2, 12, 13
Section 100a 12
Section 101 21
Section 206 ..... 14, 16
Section 212 14
Section 217 3
Section 219 13
Sections 400 et seq. 21
Sections 510-518 2
Section 602 ..... 2, 3, 4
Section 605 2

Constitutions

United States Constitution
First Amendment 4, 5, 12, 14, 15
California Constitution
Article 1, Section 2 ..... 4, 5
Article 2, Section 1 12
Article 2, Section 8 12
Article 7, Section 8 12

Law Reviews

The California Initiative Process: A Suggestion for Reform, 48 So. Cal. L. Rev. 922 (1975) 9, 10
R. Diamond *et al.*, 7 Sw.U.L. Rev. 462-3 (1975) 10
J. Skelly Wright, Politics and the Constitution: Is Money Speech? 85 Yale L.J. 1001 (1976) 8

Other Authorities

H. Alexander, Money in Politics (1972) 8
Berkeley Fair Campaign Practices Commission, Report on Campaign Spending in Berkeley Ballot Measure Campaigns, 1977-1980 (May 1981). 13
Berg *et al.*, Corruption in the American Political System (1976) 11

OTHER AUTHORITIES

California Fair Political Practices Commission, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, November 4, 1980, General Election, Issued May 27, 1981 (1980 Campaign Report) 7

California Fair Political Practices Commission's Press Release 81-14, May 28, 1981, released in conjunction with 1980 Campaign Report 7

W. Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (1950) 9

Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 434 (1939) 9

F. Hichborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1921, at 181 (J. Barry ed. 1922) 10

B. Hyink, S. Brown, & E.T. Thacker, POLITICS AND GOVERNMENT IN CALIFORNIA 125 (7th ed. 1971) 10

D.H. Lowenstein, CAMPAIGN SPENDING AND BALLOT PROPOSITIONS 1981 (prepared for delivery at the annual meeting of the American Political Science Association, September 2-6, 1981, New York City) 11

Mathews, THE BALLOT INITIATIVE, WHOM DOES IT SERVE? L.A. Times Oct. 22, 1972, Section F at 22, col. 1 10

Owens, Constantini & Wechsler, CALIFORNIA POLITICS AND PARTIES 273 (1970) 10

THE INITIATIVE, REFERENDUM AND RECALL (W. Munro ed. 1912) 9

S.D. Lydenberg, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS, COUNCIL ON ECONOMIC PRIORITIES (1979) 10

R. Mastro, D. Costlow and H. Sanchez, TAKING THE INITIATIVE: CORPORATE CONTROL OF THE REFERENDUM PROCESS THROUGH MEDIA SPENDING AND WHAT TO DO ABOUT IT, 1980 (Published by the Media Access Project) 11

Sacramento Bee, Oct. 11, 1911, at 4, col. 1 9

Shockley, THE INITIATIVE, DEMOCRACY AND MONEY: THE CASE OF COLORADO 1976, (printed in "*Hearings*" at (256-74) 11

S.J. Res. 67, Voter Initiative Constitutional Amendment: HEARINGS ON S.J. RES. 67 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMMITTEE ON THE JUDICIARY, 95th Cong. 1st Sess. at 90, 91-92, 98 (1978) 10

THE STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. Department of Commerce, Bureau of the Census 7

R. Winter-Berger, THE WASHINGTON PAY-OFF (1971) 8

D. Wilcox, GOVERNMENT BY ALL THE PEOPLE 66 (1912) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-MCDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; BARBARA BERNSTEIN, ILSE BRIEGER, PETER COHON, STUART GARDINER, MILTON GORDON, GARY GRESHER, JUDITH LEFKOWITZ and STEVEN MAYER as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEES BRIEF

QUESTION PRESENTED

Does a Berkeley Municipal Ordinance which limits the size of contributions to local ballot measure campaigns without limiting or restricting campaign expenditures in such campaigns violate the First Amendment to the United States Constitution?

Parties

The current members of the Berkeley Fair Campaign Practices Commission are:

Barbara Bernstein
Ilse Brieger
Peter Cohon
Stuart Gardiner
Milton Gordon
Gary Gresher
Judith Lefkowitz
Steven Mayer

STATEMENT OF THE CASE

The voters of Berkeley, California, have enacted, by initiative, a comprehensive campaign reform ordinance. The Election Reform Act of 1974 (Ordinance No. 4700-N.S.), *inter alia*, establishes the Fair Campaign Practices Commission to administer the law, requires the filing of periodic campaign statements disclosing receipts and expenditures, and limits contributions to candidate and ballot measure campaigns.[1] Section 602 of that Ordinance provides:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a

[1] As passed by the voters, the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns. After this Court invalidated expenditure limitations in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the California Supreme Court invalidated statewide expenditure limitations in ballot measure campaigns. *Citizens for Jobs & Energy* v. *Fair Political Practices Commission*, 16 Cal.3d 671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976). Thereafter, the City of Berkeley repealed the expenditure limitations, Sections 510-518. Although those sections are quoted in the Appendix to the Jurisdictional Statement at A-77-79, they are not in force and are not at issue in this action. In addition, the measure originally prohibited corporate and labor union contributions to both candidate campaigns and ballot measure campaigns. Section 605, to the extent that it prohibited corporate and labor union contributions to ballot measure campaigns, was invalidated in *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). The section continues to prohibit corporate and labor union contributions to candidate campaigns.

> single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)".

The term "measure" is defined in section 217 to mean:

> "any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purpose of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot."

At the April 19, 1977 municipal election, the voters of Berkeley voted on a proposed charter amendment initiative concerning rent control. Appellant Citizens Against Rent Control (hereinafter "CARC") is a campaign committee that opposed the measure. The campaign committee developed a budget of just over $100,000. By mid-March 1977, a month before the election, CARC had raised over $108,000 from more than 1,300 contributors. (J.A. 32)[2] Because its budget had been reached, the Committee completely ceased fundraising during the last month of the campaign. (J.A. 33) Of the 1,300 contributors, CARC received only nine contributions in excess of the $250 limit. Such contributions included $5,000 from the California Association of Realtors (J.A. 37); $1,000 from Mason McDuffie Company (J.A. 26); $5,000 from the Berkeley Board of Realtors, (J.A. 30); $5,000 from the Apartment Political Action Committee (J.A. 39); $1,000 from the Miramonte Company (J.A. 42); $2,000 from the B/G Management Company (J.A. 48); $1,000 from the Southern Alameda County Board of Realtors (J.A. 45), and two additional contributions that are not identified in the record totalling $850. (J.S. App. A-87-88)[3] The contributions in excess of $250 totalled $20,850.

---

[2] References to the Joint Appendix are cited as J.A. References to the Appendix to the Jurisdictional Statement are cited as J.S. App.

[3] Prior to the election, a controversy arose concerning Berkeley's intent to enforce the $250 contribution limit contained in Section 602 because certain portions of the Election Reform Ordinance had been declared unconstitutional in previous litigation. *See* note 1 *supra.* In revising the Ordinance to comply with the Court decisions, the City had mistakenly labelled Section 602 with the notation "Do Not Enforce." (J.S. App. A-86). On January 12,

(Footnote continued on following page)

On March 30, 1977, the Fair Campaign Practices Commission found that CARC had violated section 602 by accepting the aggregate sum of $18,600 in contributions exceeding $250. (J.S. App. A-88) CARC responded by filing a complaint for injunctive and declaratory relief against the City and the Commission, contending that Section 602 violated its rights of freedom of speech and association under the California and United States Constitutions and violated the rights of other named plaintiffs, who had made contributions larger than $250. (J.A. 1) Two weeks before the election, the trial court granted a temporary restraining order against enforcement of the contribution limitation. (J.A. 50) However, CARC had ended all fund raising almost a month before the election and did not raise additional funds during this period. (J.A. 33) The campaign against the initiative was successful and the proposed charter amendment was defeated.

After the election, CARC amended its complaint to allege that it had accumulated a campaign debt of approximately $8,000 and it sought to solicit large contributions to satisfy this debt. (J.A. 54) CARC then moved for summary judgment on the ground that section 602 was invalid on its face. (J.A. 64) The superior court granted the motion and rendered a judgment declaring that section 602 violated the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution. (J.A. 79) On appeal, the California Supreme Court reversed the judgment, concluding that "the Berkeley ordinance is necessary to the accomplishment of compelling governmental interests, and uses the least restrictive means to achieve those ends. It violates neither the First

---

(Footnote continued from previous page)

1977, the City Attorney advised the Fair Campaign Practices Commission in a public meeting that Section 602 had not been invalidated by previous litigation but that enforcement of the section should be given prospective application because of the misleading annotation. The City then eliminated the erroneous annotation and commenced public distribution of the revised Ordinance on January 24, 1977. (J.S. App. A-87). After the Commission's action on January 12, 1977, CARC solicited contributions in excess of $250 (J.A. 24, 26, 29, 33, 37, 39, 42, 48). The City takes the position that CARC had notice that the Ordinance would be enforced as of January 12. CARC contends that enforcement of the Ordinance should begin on January 24, 1977, when the revised Ordinance was released for public distribution. The issue is not before the Court in this appeal.

Amendment nor Article I, section 2, of the California Constitution." *Citizens Against Rent Control* v. *City of Berkeley* 27 Cal.3d 819, 832, 167 Cal. Rptr. 84, 614 P.2d 742 (1980).

This appeal follows.

SUMMARY OF ARGUMENT

The City of Berkeley does not dispute that contribution limitations implicate fundamental interests of speech and association and must be supported by sufficiently important governmental interests. But this is merely the beginning and not, as appellants would have it, the end of the inquiry, for general declarations concerning the importance of First Amendment rights do not decide specific cases. To decide this case, the extent of the contribution limit's impingement on First Amendment rights must be weighed against the interests served. *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

The Berkeley contribution limitation imposes no more than a marginal restriction on protected rights. The ordinance does not restrict the quantity or content of political speech. Unlike the Massachusetts statute invalidated in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), the Berkeley ordinance does not completely prohibit political expression. Any person may contribute $250 for or against any ballot measure. If the person wishes to spend more than $250, he must make expenditures, not contributions, but the expenditure of funds is not limited or otherwise controlled. In addition, the contribution limitation does not restrict any individual's ability to become personally involved in the campaign because volunteer personal services and incidental costs are not included as "contributions" under the ordinance.

Contribution limitations also implicate the freedom of association. However, the impact of Berkeley's ordinance on association by contributors is unsubstantial. The contribution limitation leaves the political contributor free to become a member of any political committee, to make monetary contributions cumulating $250 to support or oppose any measure, and to become personally involved in the campaign.

The record in this case shows clearly that the contribution limitation does not prevent contributors from pooling their funds to engage in effective advocacy. The appellant campaign committee raised sufficient funds to meet its campaign budget a month before the election and completely ceased fund raising during the last month of the campaign. Perhaps the clearest indication that the committee was able to communicate its point of view effectively is the fact that the rent control measure which it opposed was defeated.

The ordinance's relatively slight infringement on protected rights must be weighed against the governmental interests of maintaining the viability of the initiative and referendum. The contribution limitation seeks to assure a well informed electorate and to encourage active participation in the electoral process by limiting, not prohibiting, campaign contributions. These interests are different from, but just as significant as, state interests in candidate campaigns. The contribution limitation results in broader public participation because committees must broaden their base of support to raise funds for a political campaign. The limitation also has an indirect impact in that more people will participate in the electoral process if they believe their participation, whether in the form of money or services, is significant. It encourages greater diversity in election campaigns because entities who want to spend substantial amounts of money must communicate directly with the electorate, rather than aggregating their contributions in a single campaign committee which in turn converts the funds into speech. Finally, the contribution limit promotes the public interest in disclosure because the identities or persons who make expenditures will be communicated directly to the voters. When contributions are not limited, the campaign is usually run by a single campaign committee whose name gives little indication of the actual sources of funds.

Because Berkeley's contribution limitation promotes compelling governmental interests of maintaining the viability of the initiative process without unduly infringing on protected rights of speech and association, the California Supreme Court upheld the ordinance. Appellees respectfully request that the decision be affirmed.

ARGUMENT

I

VOTER APATHY AND THE ROLE OF THE INITIATIVE IN CALIFORNIA POLITICAL HISTORY.

Our generation is witnessing the continuing erosion of confidence in government and participation in the democratic process. Every study shows a steady decrease in voter turnout and growing dissaffection with the role of the individual in the political system.[4] The citizens of Berkeley are among the most politically active in the nation and yet, even in this community, voter turnout in municipal elections has decreased steadily from 65.9% in April 1973 to 45.6% in April 1981.[5]

Individual citizens are not only failing to vote, they are also contributing less to political campaigns. In California, the state Fair Political Practices Commission has reported that campaign contributions from private individuals in the November 1980 general election totaled only one half of the individual contributions given during the 1978 general election and represented only 5% of all contributions made. In 1978, individuals made contributions totalling $2,043,364. In 1980, the total individual contributions were $868,095, representing a 58% decrease.[6] A statement accompanying release of the campaign finance information highlighted the steady decline of private participation, and quoted the chairman of the state commission as saying:

> "These figures illustrate the alarming yet steady erosion of the private individual as a force in the political process . . . What it may portend is an undermining of a basic principle of our type of democracy"[7]

---

[4] Since 1960 voter turnout in presidential elections steadily declined from 62.8% to 51.8%. THE STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. Department of Commerce, Bureau of the Census for the year of each presidential election, lists voter turnout as follows: 1960-62.8%; 1964-61.9%; 1968-60.9%; 1972-55.5%; 1976-54.3%; 1980-51.8%.

[5] Municipal elections are held in April of every odd numbered year. Berkeley Charter, Section 4. Official voter turnout statistics are on file with the Office of the City Clerk, Berkeley, California. The city's population and number of registered voters have remained relatively constant during the same period.

[6] California Fair Political Practices Commission, *Campaign Contribution and Spending Report.* November 4, 1980, General Election, Issued May 27, 1981. (1980 Campaign Report).

[7] California Fair Political Practices Commission's Press Release 81-14, May 28, 1981, released in conjunction with 1980 Campaign Report.

The reasons for this lack of participation do not lend themselves to neat characterization, yet commentators document the widespread perception that the political system is dominated by moneyed interests. Citizens believe, and recent events tend to substantiate the view, that contributors who pump large amounts of money into political campaigns obtain access to and perhaps domination of elected officeholders.[8]

At the same time, our electronic age has made campaigning a sophisticated neo-science dependent on elaborate polling techniques, slick media campaigns and computer mailings.[9] All of which are very expensive and undoubtedly effective, but which have created a technique of political salesmanship based more on merchandising a product than informing the public.[10]

Against this background of current disillusionment with the contemporary political scene, California's right of direct democracy through the exercise of initiative, referendum and recall takes on added significance. In the words of a California appellate court:

> We take judicial notice of the fact that a large cross-section of the citizenry entertains an opinion that the government is no longer representative of the people. It takes outlandish financial resources to mount a campaign for office, lobbyists play no small part in controlling the destiny of legislative measures, and in election years our elected representatives procrastinate taking action even on urgent matters. *One counter-balance to this trend is to give vitality to the initiative power.* (emphasis added) Gayle v. Hamm, 25 Cal. App. 3d 250, 257-8, 101 Cal. Rptr. 628 (1978)

Any analysis of this case requires an understanding of the unique role that the initiative has played in California politics since it was first passed by the voters. It was adopted as a means of restoring political power to the people and is today perceived as the most powerful tool by which the voters may demand accountability in government.

---

[8] See *Buckley* v. *Valeo*, 424 U.S. at 27. See R. Winter-Berger, THE WASHINGTON PAY-OFF (1971).

[9] H. Alexander, MONEY IN POLITICS 1972.

[10] See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 Yale L.J. 1001, 1011-12 (1976).

Prior to adoption of the initiative, the Southern Pacific Railroad's political machine completely dominated selection of United States Senators, governors and state legislators.[11] It was said that party conventions merely ratified the decisions of railroad attorneys. The railroad had a strong hand in many local governments and controlled newspapers as well as public officials.[12]

In short, California's political process before 1911 was hardly one which encouraged the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354. U.S. 476, 484 (1957). Although the political energies of the period were manifest and interest groups' freedom to pool resources was unfettered, government was not responsive to the will of the people. By adopting the initiative, referendum and recall, the voters communicated their desire to "kick the Southern Pacific out of politics in the State of California."[13] It was believed that the initiative would provide an avenue for aid to the poor and minorities which had been foreclosed by corporate interests[14] and would encourage broader public discussion of the issues and increased participation in the political process.[15] In addition, initiatives would encourage drafting of laws by those with firsthand information and would thereby elicit alternative solutions to the problems of the period.[16]

On the day following the voters' overwhelming approval of the initiative amendment, an editorial in the Sacramento Bee proclaimed that the initiative process would become a "tool for change, comparable to the right to vote."[17] A decade later,

---

[11] Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 434 (1939).

[12] *The California Initiative Process: A Suggestion for Reform* 48 So. Cal. L. Rev. 922, 923, n.5. (1975)

[13] In November 1910, the Lincoln-Roosevelt League candidate, Hiram Johnson, was elected governor primarily on his campaign to "kick the Southern Pacific out of Politics in the State of California." See Key & Crouch, *supra* note 11 at 434. See generally W. Crouch, *The Initiative and Referendum in California* (1950); *The Initiative, Referendum and Recall* (W. Munro ed. 1912).

[14] D. Wilcox, *Government by All the People* 66 (1912).

[15] W. Muntro, *supra* note 13, at 21.

[16] *Id.*

[17] Sacramento Bee, Oct. 11, 1911, at 4, col.1.

California political historians confirmed that prediction and noted adoption of the initiative as a turning point in California's political history.[18]

President Wilson's famed characterization of the initiative as a 'gun behind the door' to keep political bosses and legislators honest has proved to be an apt description of California's initiative during the past seventy years.[19] Voters have utilized the initiative to overcome legislative inaction concerning issues as diverse as taxation, the death penalty, political reform, and land use.[20]

Despite the intended purpose of direct democracy, in recent years there has been widespread perception that the initiative, intended as the strongest tool by which the people could retain control over the political process, can be manipulated by the modern equivalents of the economic forces it was intended to control.[21] Large corporations have poured enormous amounts of money into the process, both in support of and opposition to ballot measures that potentially affect their economic interests.[22]

---

[18] F. Hichborn, *Story of the Session of the California Legislature of 1921*, at 181 (J. Barry ed. 1922). "From the day of their defeat at the primary polls in August, 1910, the reactionary elements began their planning to get back into power. The principal barriers in their way are the direct primary, the referendum, the recall, the initiative. Of the four, the initiative has been found to be the most important arm of the people against vice, special privilege, extortion, and the corruption that comes from the political combination of the three. The People might lose all the others, but as long as they retain the initiative they have the power to regain them by their own petition and own vote, regardless of who may control their legislature."

[19] Mathews, *The Ballot Initiative, Whom Does it Serve?* L.A. Times Oct. 22, 1972, Section F at 22, col.1.

[20] Between 1911 and 1972, 152 proposals were submitted to the voters. 48 So.Cal.L.Rev., *supra* note 12, at 927, n.29. See generally B. Hyink, S. Brown, & E.T. Thacker, POLITICS AND GOVERNMENT IN CALIFORNIA 125 (7th ed. 1971).

[21] Eg., S.J. Res. 67, Voter Initiative Constitutional Amendment: *Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary*, 95th Cong. 1st Sess. at 90, 91-92, 98 (1978) (hereinafter "*Hearings*"). R. Diamond *et al.*, 7 Sw.U.L.Rev. 462-3 (1975). Owens, Constantini & Wechsler, CALIFORNIA POLITICS AND PARTIES 273 (1970).

[22] S. D. Lydenberg, *Bankrolling Ballots: The Role Of Business in Financing State Ballot Question Campaigns, Council on Economic Priorities* (1979). The survey details corporate participation in sixteen ballot measure campaigns, each in a different state, during 1978. See Brief for the City and County of San Francisco as Amicus Curiae at 21 *et seq.*

The City of Berkeley does not contend that there is a direct correlation between money spent and outcome of local ballot measure campaigns. Appellees acknowledge that voting decisions result from a complex interplay between information the voter receives during the campaign and his pre-existing ideas and opinions. Nevertheless, there is a widespread public perception that large amounts of money skew the outcome of ballot measure campaigns and these perceptions are supported by several recent studies.[23] Professor Daniel H. Lowenstein, Acting Professor of Law at the University of California, Los Angeles, has completed a systematic study of statewide ballot measures in California between 1968-1980 in which he concludes that one sided spending is ineffective when it supports the proposition but is dominant when it opposes a measure.[24]

In June 1974, the voters of California expressed their dissatisfaction with the perceived impact of money on contemporary politics and enacted, by initiative, the Political Reform Act, Cal. Gov. Code Sections 81000 *et seq.* (West 1976), the most comprehensive political reform package since the adoption of the initiative in 1911.[25] In the same election, the citizens

---

[23] Berg *et al.*, CORRUPTION IN THE AMERCIAN POLITICAL SYSTEM (1976); Shockley, *The Initiative, Democracy and Money: the Case of Colorado* 1976, (printed in "*Hearings*" at (256-74). R. Mastro, D. Costlow and H. Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to do About It* 1980 (Published by the Media Access Project).

[24] D. H. Lowenstein, *Campaign Spending and Ballot Propositions* 1981 (prepared for delivery at the annual meeting of the American Political Science Association, September 2-6, 1981, New York City). Lowenstein notes that of the fifteen propositions supported by significant one sided spending, seven were successful and eight were defeated. On the other hand, of the ten propositions opposed by significant one-sided spending, none were defeated and only one was successful. He defines "significant one sided spending" to be spending which exceeded $250,000 and which was at least twice as high as spending on the opposite side.

[25] One of the purposes of the Political Reform Act is that "the amounts that may be expended in statewide elections should be limited in order that the importance of money in such elections may be reduced." Cal. Gov. Code Section 81002(b). (West 1976). The Act limited expenditures in statewide ballot measure campaigns and in campaigns to qualify measures for the ballot. Following *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the California Supreme Court held the California expenditure limitations unconstitutional in *Citizens for Jobs and Energy* v. *Fair Political Practices Commission*, 16 Cal. 3d

(Footnote continued on following page)

of Berkeley passed a local analog of the state act, the Berkeley Election Reform Act of 1974.[26] In the very first section of both acts, the voters noted a major reason for their disaffection and declared that "state and local governments should serve the needs of all citizens equally, without regard to their wealth." Cal. Gov Code § 81001(a) (West 1976); Ordinance No. 4700-N.S. Section 100 a.[27]

It is not only the absence or presence of large contributions in ballot measure campaigns which will be decided in this lawsuit, but whether this court will repudiate the voters' direct, though prudent, response to the cooptation of the initiative process by special interests. Such a decision would in a single stroke return to the voters all of the frustration with the political process which they vented in 1974 by enacting the Political Reform Act and the Berkeley Election Reform Act.

(Footnote continued from previous page)
671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976) and *Hardie* v. *Eu*, 18 Cal. 3d 371, 134 Cal. Rptr. 201, 556 P.2d 301 (1976). The state act does not limit contributions. Consequently, the only contribution limitations currently in effect in California are those contained in local ordinances.

[26] The power of the City of Berkeley to regulate local elections is not questioned. Berkeley is a charter city with power to make and enforce all necessary regulations with respect to its municipal affairs. *Bishop* v. *City of San Jose*, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1971). Even if Berkeley were not a charter city, it would have the power to limit contributions pursuant to Section 22808 of the California Elections Code which provides: "A city may by ordinance or resolution limit campaign contributions in municipal elections." (West 1977). Thus, the question is not the power of the City to legislate but whether the Ordinance impermissibly interferes with First Amendment freedoms.

[27] The California Constitution contains several provisions which provide the basis for the voters' actions of adopting the state and local political reform acts. Cal. Const. Art. 2, Section 1 provides "All political power is inherent in the people. Government is protected for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." Art. 2, Section 8 sets forth the right of initiative; Art. 7, Section 8 (West Supp. 1981), provides:

> "The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

II

THE BERKELEY CONTRIBUTION LIMITATION HAS A MARGINAL IMPACT ON THE EXERCISE OF SPEECH AND ASSOCIATIONAL FREEDOMS.

Under the Berkeley ordinance, any person[28] may make campaign contributions totalling $250 for or against any ballot measure. The vast majority of contributors to Berkeley campaigns contribute less than $250. These individuals are not affected in any way by the limit.[29] Any person who wishes to spend more than $250 in a Berkeley ballot measure campaign must make expenditures, instead of additional contributions. That is, after contributing $250 in support of or opposition to a ballot measure, the individual must spend his funds to express his views directly to the electorate rather than donate his funds to others.[30] The contribution limitation does not censor or suppress the content of a contributor's political speech. It limits only the extent to which a contributor can pay for the speech of another; speech that the contributor himself neither composes, nor publishes, nor controls.

At the outset, it is important to distinguish the meaning of "contribution" from "expenditure" because the ordinance limits contributions but does not restrict expenditures. The term

---

[28] "Person" is broadly defined in Section 219 to include corporations and labor unions. 'Persons' means an individual, proprietorship, firm partnership, joint venture, syndicate, business trust, company corporation, association, committee, and any other organization or group of persons acting in concert."

[29] For example, CARC raised funds from over 1300 contributors. Of these, only nine contributors donated funds in excess of the $250 limit. (J.A. 26, 30, 37, 39, 42, 45, 48; J.S. App. A-87-88). A City of Berkeley campaign spending report reveals that contributions in excess of $250 were made in campaigns involving only five of the nineteen measures that appeared on the ballot between 1977-1980, the period that the contribution limitation was not enforced. Berkeley Fair Campaign Practices Commission, *Report on Campaign Spending in Berkeley Ballot Measure Campaigns, 1977-1980* (May 1981).

[30] Placing a newspaper advertisement in one of the community's daily newspapers is perhaps the most common way that a Berkeley citizen would spend money to communicate with other voters. A half page political ad costs $854 in the Berkeley Independent & Gazette and $360 in the Daily Californian.

"contribution" refers to the funds received by a political committee from an individual, group or another campaign committee.[31] These contributions constitute a common fund from which expenditures are made. Thus, the person or entity making the contribution does not exert control over the manner in which his or her contribution is eventually spent.

By contrast, an expenditure refers to spending over which the holder of funds has control.[32] Expenditures consist of the purchase of goods and services by which a campaign is conducted including media time, printing costs and other disbursements required by "virtually every means of communicating ideas in today's mass society." *Buckley* v. *Valeo,* 424 U.S. at 19.

Although both contributions and expenditures implicate protected First Amendment interests, restrictions on expenditures impose significantly more severe restrictions on political expression than do limitations on financial contributions. *Buckley* v. *Valeo,* 424 U.S. at 23. In the recent decision of *California Medical Association* v. *Federal Election Commission,* ____U.S.L.W.____ (June 26, 1981), the Court reiterated its holding in *Buckley.* "[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection. . . ." Slip opinion at 12.

In *Buckley,* the Court set forth some of the reasons that a contribution limitation only marginally restricts communication by the contributor, stating "a limitation on the amount of money a person may give to a campaign organization involves little direct restraint on his political communication but does not in any way infringe on the contributor's freedom to discuss. . . issues" and, "the transformation of contributions into political debate involves speech by someone other than the contributor." Thus, the contribution limitation in no way restricts the contributor's right to speak or to spend funds on political expression. 424 U.S. at 21.

---

[31] "Contribution" is defined in Section 206 of the Ordinance. J.S. App. A-60.

[32] "Expenditure" is defined in Section 212 of the Ordinance. J.S. App. A-62.

Despite the express language of *Buckley*, appellant Citizen's Against Rent Control and their *amici* assert that limiting contributions will muffle or stifle their political speech.[33] They attempt to distinguish the Court's analysis in *Buckley* by arguing that a contribution to a ballot measure campaign is closer to pure speech than a contribution to a candidate campaign because a ballot measure contribution expresses the contributor's opinion with respect to a single issue. (A.B. at 13) The assertion is no more true in this case than in a candidate campaign, for ballot measure campaigns, like candidate campaigns, may involve a single issue or numerous issues. For example, the rent control measure opposed by CARC raised a number of issues. Contributors to CARC may have been communicating views as diverse as a rental property owner who feared loss of income, a home owner who believed that rent control would diminish the property tax base thereby reducing municipal services, or a student who was concerned about reduction in rental housing supply.[34] Contributors may have included persons who favored rent control but did not support the particular proposal. The contributions served as a general expression of their opposition to the measure but did not communicate the underlying basis of each contributor's position. Conversely, certain ballot measures may involve only a single issue, but candidates, too, run for office on a single issue. E.g., *McRae* v. *Califano*, 491 F. Supp. 630, 715 (1980). A contribution to a single issue ballot measure is no more "pure speech" than a contribution to a single issue candidate. The First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign

---

[33] Appellants seem to confuse "expenditures" and "contributions" and, as a result, much of their analysis is fallacious. For example, Appellants' Brief at 9 correctly states that contributions are a form of political speech, but then relies on a paragraph from Buckley regarding *expenditures*, not *contributions*. "A restriction on the amount of money a person or group can *spend* on political communication during a campaign necessarily reduces the quantity of expression . . . (emphasis added) *Buckley* v. *Valeo* 424 U.S. at 19, quoted in A.B. at 9-10. Appellants fail to acknowledge that there is no restriction whatsoever on the amount that they can *spend* in a campaign.

[34] *See* declaration filed by Donald Solem, the professional campaign management consultant retained to manage the "No on Proposition B" campaign. (J.S. 33). *See also*, declaration filed by M. R. Griffin, Mason-McDuffie Company (J.A. 25).

organization whether the campaign organization expresses a view on a single issue or on many issues. *California Medical Association* v. *FEC, supra,* slip opinion at 14.

Like the Federal Campaign Act, the Berkeley ordinance limits one means of associating with a campaign committee but leaves the contributor free to become a member of any political committee and to make monetary contributions cumulating $250 to support or oppose any measure.[35] In addition, the contributor may participate personally in all of the campaign committee's efforts relating to the measure.[36] Appellants and all who want to associate with them can engage in research, discuss campaign strategy, poll voters by walking precincts or making telephone calls, coordinate mailings and solicit others to contribute funds without restriction. As the California Supreme Court held,

> "[U]nder the Berkeley Ordinance anyone who wishes to do so may join and work for any committee supporting or opposing a ballot measure. This is the heart of the freedom to associate. . . ." *Citizens Against Rent Control* v. *City of Berkeley,* 27 Cal.3d at 830.

At least four of the nine entities who made contributions in excess of $250 were membership associations whose members all could have contributed directly to CARC. For example, the California Association of Realtors, composed of 100,000 realtors of whom 450 live in Berkeley, contributed $5,000. (J.A. 37) The realtor's association claims that the contribution

---

[35] This court has not expressly extended the freedom of association to entities that are not natural persons, e.g. *Branti* v *Finkel,* 445 U.S. 507 (1980), individual members of a political party; *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), members of a labor union. In the instant case, none of the contributors who gave or sought to give contributions in excess of $250 was a natural person. *See* text, supra at note 3. They were all seeking to promote a direct economic interest by defeating the ballot measure. Appellees question whether these entities should be afforded associational freedoms to the same extent that the Court has protected the freedom of association of individuals in our society.

[36] Volunteer activities and incidental expenses are excluded from the definition of "contribution." "[C]ontribution' shall not include a gift of service or labor, . . . nor shall the term 'contribution' include a gift of the use of personal or real property where the value of such use is not in excess of $50, nor shall it include food and beverages the value of which for any one event is no more than $50." Ordinance No. 4700-N.S., Section 206.

limitation restricts its freedom of association with CARC and other contributors, but this court has reached a contrary result in an analogous factual situation. *California Medical Association* v. *Federal Election Commission, supra.* The California Medical Association is an association of approximately 25,000 doctors; CALPAC is a separate legal entity. The associational implications of the case did not even merit consideration by this Court when it held CMA could not contribute more than $5,000, the maximum allowed by federal law, to CALPAC. Similarly, the California Realtors Association and other membership organizations cannot claim a restriction on their freedom to associate that is comparable to that of an individual who seeks to participate in a campaign. Their right of association, if any, is so attenuated that it is entitled to only "a limited measure of protection, commensurate with its subordinate position on the scale of First Amendment values." Compare *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) with *In re Primus,* 436 U.S. 412 (1978).

The contribution limitation does not prevent campaign committees from aggregating large sums of money to promote effective advocacy. The record in this case demonstrates that the ability of CARC, the recipient political committee, to carry on an effective campaign was not impaired by the contribution limitation. The campaign committee developed a budget of approximately $100,000 and raised almost $90,000 from over 1,300 contributors who complied with the statutory limit. Because its budget had been reached, the committee completely ceased fund-raising during the last month of the campaign, a period when presumably it could have raised additional funds. Perhaps the clearest indication that the committee was able to communicate its point of view to the electorate effectively is the fact that the rent control measure was defeated. Thus, the contribution limitation did not in this case prevent contributors from joining with others who share similar ideas and engaging in effective advocacy to promote those ideas. This is the essence of the freedom of association. *N.A.A.C.P.* v. *Alabama* 357 U.S. 449, 460 (1958).

Appellants have made no showing that the limitation would prevent effective advocacy in any other case. In fact, a persuasive argument can be made that the contribution limita-

tions actually increase, rather than restrict, a contributor's right to associate because the campaign committee functioning in a community with contribution limitations must broaden its fund-raising activity and involve more people in the campaign than a similar campaign in a community without contribution limits. Thus, the individual contributor will have an opportunity to associate with a greater number of persons who have pooled their respective resources in support of a common goal.[37]

In summary, the contribution limitation imposes only an incidental impact on the contributor's freedom of speech and association. It allows the contributor to make contributions totaling $250 in any ballot measure campaign, to make unlimited direct expenditures, and to volunteer his personal efforts without restriction. The overall effect of the limitation is to require campaign committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression. *Buckley* v. *Valeo,* 424 U.S. at 21-22.

III

THE BERKELEY ORDINANCE SERVES THE COMPELLING GOVERNMENTAL INTEREST OF PRESERVING THE INTEGRITY OF AND PUBLIC CONFIDENCE IN THE INITIATIVE.

By eliminating large contributions to ballot measure campaigns, the contribution limitation vindicates state interests in preserving the integrity of the initiative process and sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government. These are clearly interests of the highest importance. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 788-9 (1977).

In *Bellotti,* the Court stated that "the risk of corruption perceived in cases involving candidate elections (citations

[37] Cf. *Buckley* v. *Valeo* 424 U.S. at 106-7. "Counting only the first $250 of each contribution for eligibility purposes (for federal matching funds) requires candidates to solicit smaller contributions from numerous people . . . The thrust of the legislation is to reduce barriers and to enhance the importance of smaller contributions. (footnotes omitted)."

omitted) simply is not present in a popular vote on a public issue. . ." [38] *Id.* at 790. Subsequent cases involving campaign restrictions in ballot measure campaigns have interpreted this statement to mean that there are no governmental interests that sustain restrictions in ballot measure campaigns. *Let's Help Florida* v. *McCrary,* 621 F.2d 195 (5th Cir. 1980), appeal docketed No. 80-970 (Dec. 8, 1980); *C&C Plywood Corp.* v. *Hanson,* 583 F.2d 421 (9th Cir. 1978). To the contrary, the state interest in maintaining the viability of the initiative process is substantial. California courts have consistently recognized that the initiative is "one of the most precious rights of the democratic process," *Mervynne* v. *Acker,* 189 Cal. App.2d 558, 563, 11 Cal. Rptr. 340 (1961), and a right that must be jealously guarded. *Fair Political Practices Commission* v. *Superior Court (Institute of Governmental Advocates),* 25 Cal.3d 33, 41, 157 Cal. Rptr. 855, 599 P.2d 46 (1979). "The initiative power must be broadly construed, resolving all doubts in favor of the reserved power [of the people]." *Associated Homebuilders* v. *City of Livermore,* 18 Cal.3d 582, 596, 135 Cal. Rptr. 41, 557 P.2d 473. (1976)

The contribution limitation seeks to maintain the initiative as an effective tool of the individual citizen in a democracy, thereby reversing the current trend toward loss of confidence in the political system. It results in broader public participation because committees must broaden their base of support to raise funds for a political campaign. The limitation also has an indirect impact in that more people will participate in the electoral process if they believe their participation, whether in the form of money or services, is significant. It promotes greater diversity in election campaigns because entities that

[38] The City of Berkeley acknowledges that contributions to ballot measure campaigns do not create the same potential for bribery or *quid pro quo* as they do in candidate campaigns. However, in reviewing the interests which may support the state's legitimate effort to regulate ballot measure contributions it is important to note certain facts in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, that suggest the Legislature had attempted "to give one side of a debatable public question an advantage in expressing its views to the people," 435 U.S. at 785. The Legislature had placed the income tax measure on the ballot four times in recent years and had amended the challenged statute to specify that individual taxation is a subject about which corporations may never make their ideas public. *Id.* at 769-70, n.3.

want to spend substantial amounts of money must make expenditures rather than aggregating their contributions in a single campaign committee. The contribution limitation also promotes the public interest in disclosure, because the identities of entities that communicate directly about the measure will be immediately and effectively disclosed to the voting public.

By restricting the size of contributions, the Berkeley ordinance requires major contributors to communicate directly with the voters instead of giving money to a campaign committee which then converts the funds to speech. If the ordinance has any impact on speech, it is to assure that different views will be presented to the voters rather than restricting the quantity of political debate. Thus, it acts to facilitate and enlarge public discussion and participation in the electoral process, goals that are vital to a self-governing people. *Buckley* v. *Valeo*, 424 U.S. at 92-93.

This Court has consistently stressed the need for debate and communication of different points of view, particularly in the context of an election.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of... matters relating to political processes. *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966).

The Court has long realized that the communication of diverse views, even those resulting in "verbal tumult", "discord", and "offensive utterance" are necessary to maintain the strength of our political system. *Cohen* v. *California*, 403 U.S. 15, 24-25 (1971)

> ... [P]eople will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)

Most of the cases in which this Court has reiterated the importance of permitting citizens to receive information from diverse sources have arisen because the state attempted to prevent communication rather than, as in this case, to stimulate debate. Nevertheless, we can conceive of no reason why the basic premise that the truth will emerge from diversity and debate should not be applied to uphold a local ordinance which seeks to encourage and protect the free flow of ideas.

The case of *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241 (1974), is distinguishable because it involved governmental interference with editorial policy of the press, a direct and substantial infringement on protected rights. The statute, if upheld, would have required a newspaper to print what it would not otherwise print and might well have resulted in less political debate instead of more. 418 U.S. at 256-7. In the instant case, all of the speakers remained free to speak and they were not required to communicate anything they would not otherwise have said.

The contribution limitation also serves an important governmental purpose in an informed electorate by increasing disclosure of communications concerning ballot measures.[39] Entities who want to make major disbursements in a ballot measure campaign must make expenditures, rather than contributions. Because political communications state the source of the funds, voters will be able to identify the actual source of the message.[40] In the absence of contribution limitations, most campaign literature and other communications are produced by

---

[39] The legislative findings of the Berkeley Ordinance provide, in part, . . . "the influence of large campaign contributions is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate." Ord. 4700-N.S. Sec. 101. Campaign committees file periodic campaign disclosure reports disclosing information about receipts and disbursements. California Gov. Code Section 84100 *et seq.* (West 1976) Berkeley Ordinance 4700-N.S., Sections 400 *et seq.* While financial disclosure plays a salutary purpose of informing the voters, the electorate could reasonably conclude that financial disclosure was only a partial measure to remedy the perceived problem. Cf. *Buckley* v. *Valeo*, 424 U.S. at 28.

[40] E.g., Cal.Gov.Code Section 84305 (West 1976) prohibits any person form making an expenditure for a mailing of 200 or more identical pieces of mail unless the outside of each piece and at least one of the inserts includes the sender's name, address and city in no less than six-point type.

campaign committees whose names neither identify individual contributors nor the substance of the measure. The names of some committees do not accurately portray the subject of their concern.[41]

Disclosure of supporters and opponents is particularly important in a ballot measure campaign because a ballot measure, unlike a candidate, is devoid of personality and is not affiliated with a political party. Thus, information concerning who supports or opposes a ballot measure significantly affects voter evaluation of a particular proposal. *Brown* v. *Superior Court (Citizens Against the Street and Road Tax Trap)*, 5 Cal.3d 509, 522, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971). In addition, identification of the source of campaign literature facilitates confrontation and refutation by the opposing parties, thus stimulating political debate. *Canon* v. *Justice Court,* 61 Cal.2d 446, 452-3, 39 Cal. Rptr. 228, 393 P.2d 428 (1964).

Two other cases involving campaign restrictions in ballot measure campaigns have held that the state interest in assuring full disclosure in a ballot measure campaign is not sufficient to sustain contribution limits or prohibitions. In both cases, however, the statutory schemes were sufficiently different from the Berkeley ordinance so as to compel a different result.

Let's Help Florida v. *McCrary,* 621 F.2d 195 (5th Cir. 1980), *appeal docketed,* No. 80-970 (Dec. 8, 1980), invalidated the Florida law limiting contributions to ballot measure campaigns.[42] Like the Berkeley ordinance, the Florida statute limits contributions but does not restrict independent expenditures. Significantly, however, the Florida statute permits contributors to make multiple contributions to any and all committees in a campaign. Thus, a contributor who has made

---

[41] Appellant committee is "Citizens Against Rent Control/Coalition for Fair Housing." In June 1980, the committee opposing another rent control initiative campaigned under the name "Berkeley Fair Housing Committee." "Fair Housing" traditionally refers to the elimination of housing discrimination, not rent control. Cf. Cal. Gov. Code Sections 12900 *et seq.* (West (1980). The salutory purpose of means designed to clarify such representation to the voters cannot be denied. See Cal. Const., Art. 7, Section 8 (West Supp. 1981).

[42] Under Florida Law, contributions to statewide ballot measures are limited to $3,000 and contributions to countrywide measures are restricted to $1,000. Fla. Stat. Ann. Section 106.08(1)(d) and (e) (West Supp. 1980).

the maximum contribution to one committee can simply make another contribution to another committee. The multiple committee provision prevents the Florida statute from furthering the state interest in disclosure for, as the Fifth Circuit observed, "(T)hese multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors." *Let's Help Florida* v. *McCrary, supra* at 200.[43] In contrast, the Berkeley ordinance places a limit on the total amount of contributions that can be made in an entire campaign, not merely to a committee.

The Ninth Circuit has invalidated a Montana statute that completely prohibited corporate campaign contributions but permitted expenditures. *C & C Plywood Corp.* v. *Hanson*, 583 F.2d 421 (9th Cir. 1978). Rejecting the state's argument that prohibiting contributions while permitting expenditures promotes the state's interest in disclosing the corporate source of political material, the Ninth Circuit held that,

> "... the complete suppression of expression created by the Montana statute is overbroad and impermissible." 583 F.2d at 425.

Unlike the constitutional infirmity identified in *C & C Plywood*, the Berkeley ordinance allows corporations and all other persons to join a campaign association, pool their resources to communicate with the electorate, and participate personally in the campaign, subject only to the $250 contribution limit. In the instant case, the extent to which the ordinance impinges on protected freedoms is substantially less and is, we submit, supported by the state interests at issue.[44]

Amicus Pacific Gas and Electric ("PG&E") asserts that the state interest in reestablishing voter confidence in the initiative

---

[43] *Let's Help Florida* v. *McCrary* 621 F.2d 195 (5th Cir. 1980) is also distinguishable from the instant case because of the extent to which the Florida Statute infringes on protected rights. In contrast to this case, it was undisputed that the contributions limitation prevented the campaign committee from amassing enough funds to carry on an effective campaign. *Let's Help Florida* v. *Smathers*, 453 F. Supp. 1003, 1011 (N.D. Fla. 1978).

[44] *Schwartz* v. *Romnes*, 495 F.2d 844 (2d Cir. 1974) and *Frias* v. *Board of Trustees of Ector County*, 584 S.W.2d 944 (Tex.Civ.App. 1979) are distinguishable from the instant case because the challenged statutes, like *Bellotti*, prohibited all corporate participation in ballot measure campaigns.

through contribution limitations is illusory because a person will still be able to spend large amounts of money on the campaign by making independent expenditures.

> "... if there can be no limit placed upon the right of an individual to spend money in a ballot measure election, it does not make sense to limit the amount that same person can donate to a committee. To do so would be to accomplish an illusory goal." Brief for PG&E as Amicus Curiae at 16

PG&E's argument ignores the balance that our society must strike between the competing interests of different persons. Both state and local campaign reform acts contained expenditure limitations at the time they were passed by the voters. This Court subsequently held that expenditure limitations were invalid, and the California courts followed. *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Citizens For Jobs and Energy* v. *Fair Political Practices Comm., supra*, 16 Cal.3d 671; *Hardie* v. *Eu, supra*, 18 Cal.3d 371. Expenditure limitations were the most direct way of assuring citizens that their political participation is significant. Expenditure limitations, however, failed to accommodate the rights of persons who wish to spend large amounts of money in campaigns.

Contribution limitations, on the other hand, promote the integrity of the initiative by maintaining diversity of ideas and providing more accurate disclosure without unreasonably infringing on the rights of those who seek to communicate. PG&E is itself a good example of the way that the contribution limitation can promote disclosure without infringing on individual rights. In 1972, there was a measure on the ballot that would have required Berkeley to acquire its own electric generating facilities. Two committees opposed the measure, "Citizens Against Electric Takeover" and "Southwest Berkeley No No No on W." Campaign statements filed by Southwest Berkeley No No No on W Committee reveal that there was only one contributor to that committee, namely PG&E.[45] Under the law, PG&E has the right to spend all it wishes in support of or opposition to any measure, but citizens would

[45] Campaign statements on file with the City Clerk, Berkeley, California. P.G.&E. contributed $7150 to "Southwest Berkeley No No No on W."

have been better informed if the source of the communications had been disclosed as "PG&E" instead of "Southwest Berkeley No No No on W." This is a purpose the contribution limitation seeks to achieve.

The Berkeley contribution limitation is narrowly tailored to address the most serious problem in ballot measure campaigns—large campaign contributions. The limitation does not restrict expenditures; it does not censor content. Instead it applies specifically to campaign committees raising funds for the purpose of influencing voters respecting ballot measures.[46] Moreover, even if the ordinance could be more precisely tailored, the voters were not required to select the least restrictive means of protecting the integrity of the legislative scheme because the limitation does not restrict the ability of individuals to engage in protected political advocacy. *California Medical Assn.* v. *Federal Election Commission*, ____ U.S.L.W. ____(June 26, 1981) slip opinion at 16, n. 20.

CONCLUSION

Berkeley's $250 limitation on contributions to ballot measure campaigns serves to encourage broader public participation in the political process. It promotes greater diversity and disclosure in local ballot measure campaigns, thereby maintaining the initiative as a viable tool by which individual citizens may remedy legislative inaction. The limitation leaves persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent by supporting ballot measure committees with financial resources.

---

[46] Appellant's argument that the lower court decision endangers "political communication and association concerning non-ballot issues" mischaracterizes both the nature of the protected rights and the significance of the governmental interests in this case. (A.B. 33-34). Large campaign contributions made in the context of an election campaign are simply not entitled to the same level of protection as donations to finance a general discussion of issues, even if both can somehow be lumped within the generic term "political." Thus, disclosure of contributions to campaign committees can be required, *Buckley* v. *Valeo* 424 U.S. at 68, but disclosure of dues and non-political contributions to membership organizations cannot be, *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

For the reasons set forth above, appellees respectfully request that the judgment of the California Supreme Court be affirmed.

Respectfully submitted

NATALIE E. WEST
City Attorney
Counsel of Record

CHARLES O. TRIEBEL, JR.
2180 Milvia St.
Fifth Floor
Berkeley, CA 94704
(415) 644-6380
Attorneys for Appellees.

STEVEN L. MAYER
650 California St.
Suite 2900
San Francisco, CA 94108
(415) 434-1600

Office - Supreme Court, U.S.
FILED
OCT 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITIZENS AGAINST RENT CONTROL/ COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLANTS' REPLY BRIEF

VIGO G. NIELSEN, JR.
Counsel of Record
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Suite 2500, The Alcoa Building
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 362-1940
Attorneys for Appellants

TABLE OF CONTENTS

PAGE

ARGUMENT 1

A. Limitations on Contributions to a Ballot Measure Committee Directly and Substantially Restrain the Exercise of Speech and Associational Rights 1

B. That the Ordinance Leaves Open Other Avenues of Communication Is Irrelevant 3

C. Section 602 Serves No Compelling Governmental Interest . 4

1. The true compelling governmental interests in this case support overturning the Ordinance 4

2. The justification for limits on contributions in candidate campaigns is not present in ballot measure campaigns 4

3. Appellees' claims that the Ordinance is necessary to overcome "voter apathy" and to encourage participation in the election process have no substance 6

4. Contribution limits are not the least restrictive means to regulate campaign disclosure 10

CONCLUSION 12

TABLE OF AUTHORITIES CITED

CASES — PAGE

Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976) 5
Brandenburg v. Ohio, 395 U.S. 444 (1969) 7
Buckley v. Valeo, 424 U.S. 1 (1976) 1, 3, 4, 7
California Medical Association v. Federal Elections Commission, ____ U.S. ____, 101 S. Ct. 2712 (June 26, 1981) 5, 6
C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978) .. 5
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 2, 5, 6, 7, 10
Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980), *appeal docketed* No. 80-970 (Dec. 8, 1980) 5, 11
NAACP v. Alabama, 357 U.S. 449 (1958) 4
Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1974) 5
Thomas v. Collins, 323 U.S. 516 (1945) 7

CONSTITUTIONS, STATUTES AND ORDINANCES

U.S. CONST. amend. I 1, 2, 3, 6, 7, 10
2 U.S.C. § 432(e)(5) (Supp. 1979) 11
11 C.F.R. § 102.14(c) (1981) 11
CAL. CODE CIV. PRO. § 526 (Deering) 2
CAL. GOV'T CODE (Deering)
Section 84100 *et seq.* 11
Section 84200 *et seq.* 11
Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-N.S. (June 4, 1974) 1, 2, 3, 4 6, 7, 9, 10
Section 112 11
Section 205 4
Section 206 4
Section 219 4
Section 602 1

OTHER AUTHORITIES

BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (MAY 1981) 3, 9
BRESTOFF, N., *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 922 (1975) 9
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 7, 1978 GENERAL ELECTION 9
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 4, 1980 GENERAL ELECTION 9
U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1980) 8

ARGUMENT

A. Limitations on Contributions to a Ballot Measure Committee Directly and Substantially Restrain the Exercise of Speech and Associational Rights.

Appellees' Brief does not meet the issue before the Court. There can be no dispute that section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) (the Ordinance), in limiting to $250 the right of contribution to a ballot measure campaign committee, directly impinges upon the constitutional guarantees of freedom of speech and assembly, and must give way unless, under exacting scrutiny, it is proved to serve in the least restrictive way possible some governmental interest so compelling as to require overriding those guaranteed rights.

There is no argument that a contribution to a campaign committee which will express to the electorate opinions about a ballot measure is a form of speech, and that joining with others in providing means to express such opinions is association guaranteed by the Constitution.

> As we have seen, group association is protected because it enhances "[e]ffective advocacy."... The right to join together "for the advancement of beliefs and ideas,"... is diluted if it does not include the right to pool money through contributions, for funds are often essential if "advocacy" is to be truly or optimally "effective."

Buckley v. *Valeo*, 424 U.S. 1, 65-66 (1977) (quoting *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)). These are among the most precious and jealously guarded rights of citizens.

The right to speak implies the right to be heard. With an electorate of tens of thousands of voters in Berkeley, a single effort to convey one's views to the electorate on any measure requires at a minimum a sizable advertisement in a newspaper of wide circulation, a general mailing, a radio speech, or television time. Such communications require substantial

funds. A campaign sufficient to win the attention of the voters and to express the facts, views and reasons of the speaker may well require extensive use of all these media. In today's context, to limit one's "voice" to $250 is to stifle it. [1]

Ballot measures may be clear and simple, or they may be complex in both structure and application. To present one's side on a ballot measure issue requires research, analysis, fact-gathering and publication which most persons can effect only through a committee; otherwise the ability to persuade the electorate may be lost. If contributions are limited much valuable information which a campaign committee could provide concerning the purpose, meaning and application of a ballot measure may remain unpublished. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785 n. 21 (1978). Yet, the voters have a vital need for all available information lest they vote blindly or be constrained not to vote at all.

The "active, alert responsibility of the individual citizen in a democracy for the wise conduct of government"—an interest of the highest importance, *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 788-89 (quoting *United States* v. *Automobile Workers,* 352 U.S. 567, 575 (1957)),—is ill-served by impairing the ability of others to reach citizens with their information and views on the subject to be voted on.

> This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.". . .

---

[1] Contrary to appellees' contention, the record establishes that appellants' exercise of first amendment rights was substantially affected by the Ordinance here. Just twenty days before the election appellees ordered appellant, Citizens Against Rent Control (hereinafter CARC), to forfeit to the Berkeley treasury $18,600 collected in excess of the Ordinance limitation. CARC submitted uncontroverted evidence that those funds were necessary for CARC "to present comprehensive economic, technical and statistical data to the voters" of the social and economic effects of Measure B, and that CARC's remaining funds were "insufficient to communicate this information to the voters." Joint Appendix (Jt. App.) at 34-35. In granting a temporary restraining order the trial court found that appellants had shown that such a forfeiture would cause irreparable injury. Jt. App. at 41; CAL. CODE CIV. PROC. § 526.

Buckley v. *Valeo*, 424 U.S. at 14 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

The Ordinance further severely restricts the associational rights of those who do not contribute more than $250 but who desire to pool their resources with those who would contribute more than the limit. The Ordinance also substantially harms those who have sufficient funds to contribute more than the limit but not enough resources or commitment to conduct an effective campaign independently from all others. For example, in 1977, a single mailing to each of Berkeley's registered voters cost $12,800.[2]

Here the limitation is not "marginal," but crushing. The first amendment declares that the named freedoms shall not be infringed; this Ordinance strikes at the heart of first amendment guarantees which are of special importance in connection with direct voting on ballot measures.

B. That the Ordinance Leaves Open Other Avenues of Communication Is Irrelevant.

The suggestion in Appellees' Brief that the Ordinance leaves other avenues of communication open misses the point. The fact that independent expenditures are not limited, that there is no prohibition against personal services in connection with an election, and that no limit is placed on the amount which campaign committees may collect and spend as long as each individual contribution is $250 or less are all immaterial. Appellees' Brief at 13-18. It is not what Berkeley has left available for persons to say and do, but what it has taken away. The crucial question is: Do the limitations in the Ordinance impair the freedoms of speech and association which the first amendment protects? To this question the answer is clearly yes.

Berkeley's contention that the Ordinance permits citizens to spend more than $250 for or against a ballot measure and associate with a committee is misleading. Appellees' Brief at

[2] Jt. App. at 32. The largest contribution to CARC was $5,000. BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (May 1981) at 5.

13-14. Berkeley fails to mention that "unlimited" expenditures must be made without any planning, coordination or pooling of resources whatsoever with any other person or committee that shares the spender's beliefs, otherwise they are deemed to be contributions subject to the Ordinance. Ordinance sections 205, 206 and 219, Jurisdictional Statement Appendix (J.S. App.) at A-60-63. Thus the Ordinance diminishes the right of citizens who want to spend more than $250 to join and to advocate as a group their political beliefs and thereby reduces the effectiveness of those efforts. *See NAACP* v. *Alabama,* 357 U.S. 449, 461-63 (1958).

C. Section 602 Serves No Compelling Governmental Interest.

1. The true compelling governmental interests in this case support overturning the Ordinance.

No imminently threatened compelling governmental interest is served by the Ordinance. Rather, the societal interests in protecting the unrestricted right of anyone to communicate fully opinions, reasons and supporting data regarding a ballot measure to the voters and the right to associate with others in effecting that purpose, as well as the right of potential voters to receive the full benefit of all opinions and reasons which might influence their voting decisions, are the compelling interests in this matter.

2. The justification for limits on contributions in candidate campaigns is not present in ballot measure campaigns.

Appellees cannot rely on *Buckley's* sanction of candidate contribution limits which serve the compelling governmental interest of preventing corruption or the appearance of corruption of public officeholders caused by large contributions. The "evil" found in *Buckley* was not the accomplishment of speech to other voters which substantial contributions make possible, but rather the actual or potential corrupting influence which large contributions may have upon the candidate-recipient.

The differences between candidate and ballot measure campaigns, in terms of compelling societal interests, are dramatic and conclusive. One who contributes lavishly to a

political candidate may do so in expectation that that candidate, if elected, will pay off his or her "obligation" to the contributor by acting in the contributor's favor in future matters; in other words, this lavish contribution is an appeal to the venality of the individual politician and an attempt to buy the candidate's allegiance. In simple terms, large contributions might buy a politician's future favors but a ballot measure cannot be corrupted.

> The risk of corruption perceived in cases involving candidate elections, *e.g., United States* v. *Automobile Workers, supra; United States* v. *CIO, supra,* simply is not present in a popular vote on a public issue.

First National Bank of Boston v. *Bellotti,* 435 U.S. at 790.

A ballot measure is a present, conclusive proposition on which the public votes "yes" or "no." The electorate who adopt it obtain exactly what it says, no more or less. It is inanimate; it cannot take future actions and make future judgments. The potential corruption and denigration of the electoral process which might be observed in a political candidacy simply does not exist in the context of a ballot measure. Every decision, save that of the court below, which involves limitations or prohibitions on ballot measure contributions, as distinguished from contributions to candidates for public office, emphasizes this distinction and strikes down prohibitions and limitations upon contributions to ballot measure campaigns.[3] The contribution—the advocacy—in the latter case is directed toward the voters themselves, relating to a specific issue to be decided by their votes at a forthcoming election. In this area the most complete and uninhibited freedoms of association and speech are the very foundation stones of a democratic society.

Berkeley's reliance on *California Medical Association* v. *Federal Election Commission,* ____U.S.____, 101 S. Ct. 2712 (June 26, 1981) is also falacious. CMA upheld limits on

[3] *See* First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980) *appeal docketed* No. 80-970 (Dec. 8, 1980); Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10), 396 Mich. 465, 242 N.W.2d 3 (1976); C & C Plywood Corp. v. Hanson, 583 F.2d 421 (9th Cir. 1978); Schwartz v. Romnes, 495 F.2d 844 (2nd Cir. 1974); *see also* Appellants' Brief at 19-23. The decisions of the California Court of Appeal and the Alameda County Superior Court are in accord.

contributions to multi-candidate political committees; it did not involve or even discuss contributions to ballot measure committees. Central to the *CMA* opinion was that the challenged restrictions prevented circumvention of candidate contribution limits upheld by *Buckley*; such a rationale clearly is not applicable to the case at bar. Moreover, *CMA* expressly declined to decide whether the first amendment would tolerate limits on "the amount individuals could *jointly expend* to express their political views . . ." and concluded that the issues before it were "distinguishable from expenditures made jointly by groups of individuals in order to express common political views." *Id.* at 2722 n. 17 (emphasis added).

3. Appellees' claims that the Ordinance is necessary to overcome "voter apathy" and to encourage participation in the election process have no substance.

Appellees argue that campaign contributions of more than $250 contribute to "voter apathy" and that curtailment of contributions would enlarge public discussion and participation in the political process and "preserve the integrity of the initiative." These arguments are unproven speculation at most; worse, they are inherently self-contradictory. Appellees illogically assert that if the effective promulgation of campaign views is limited, the voters will be more interested and will participate in the election process more widely. The common sense, realistic view of causes and effects is that unrestricted publication of views, facts and reasons tends to *increase* voter interest and participation.

When distilled, appellees' paternalistic argument is that government should determine the best way for political associations to be formed, political speech to be communicated and political campaigns to be conducted. That concept is foreign to the first amendment.

Moreover, Berkeley's claims that the Ordinance maintains the viability of the initiative process and encourages citizen participation in the political process, Appellees' Brief at 6, have been rejected by this Court in *First National Bank of Boston* v.

Bellotti, 435 U.S. at 787-88 and 790 n. 29, and by every other appellate court to consider prohibitions on ballot measure contributions.[4] The effect of circumscribing ballot measure contributions is to restrain certain persons from effectively communicating their views to the electorate and thereby to influence the outcome of elections. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley* v. *Valeo,* 424 U.S. at 48-49. "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: . . ." *First National Bank of Boston* v. *Bellotti,* 435 U.S. at 790.

Appellees' Brief fails to discuss how or why its asserted interests are "imminently threatened" either by unlimited contributions or by any other alleged evil.[5] Appellees must establish that the Ordinance serves compelling interests which are imminently threatened by appellants' speech and association. *See First National Bank of Boston* v. *Bellotti,* 435 U.S. at 789. Yet, Berkeley merely recites selective statistics in an attempt to show that fewer people are voting now than in certain years past. Such recitation does not establish the existence of a threat to the initiative process. Indeed the initiative has flourished in the past decade and its usage has dramatically increased.[6] Actually, the extent and degree of voter participation fluctuates greatly and is affected by many factors including the timing of candidate elections, socioeconomic conditions, personal predispositions such as party affiliation and personal ideology, and liberal and conservative voting trends.[7]

---

[4] These decisions are reviewed in Appellants' Brief at 19-23; *see also* note 3, *supra.*

[5] The California Supreme Court also failed to mention how Berkeley satisfied this crucial element of strict scrutiny which is deeply rooted in judicial precedent and stems from *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969) and *Thomas* v. *Collins,* 323 U.S. 516 (1945): "[A]ny attempt to restrict those [first amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely but by clear and present danger." 323 U.S. at 530.

[6] *See* Appellants' Brief at 28 n. 20.

[7] *See* Appellants' Brief at 26 n. 10.

Elimination of voter apathy simply cannot be linked to contribution limits. Berkeley's statement that "[e]very study shows a steady decrease in voter turnout . . ." is inaccurate and its citation of the Census Bureau's *Statistical Abstract of the United States* as showing that "[s]ince 1960 voter turnout in presidential elections steadily declined from 62.8% to 51.8%" in 1980 is misleading.[8] Appellees' Brief at 7 n. 4. The statistics presented by appellees do not accurately reflect the voting pattern. Appellees chose as their starting point the 1960 Kennedy-Nixon election, the year of the highest voter turnout in a presidential election since 1932. The complete statistics show that during the past fifty years there has been an erratic pattern of voter turnout but little net substantive change. Voter turnout in presidential elections was as follows:

1932	52.4%
1936	56.9%
1940	58.9%
1944	56.0%
1948	51.1%
1952	61.6%
1956	59.3%
1960	62.8%
1964	61.9%
1968	60.9%
1972	55.5%
1976	54.3%
1980	52.5%[9]

Appellees also cite statistics purporting to show that Berkeley voter participation decreased from 65.9% in April 1973 to 45.6% in April 1981. Appellees' Brief at 7. These statistics have been discriminately selected and do not accurately reflect voter turnout in Berkeley. For example, in the 1953 Berkeley municipal election there was only a 38.8% voter turnout; in

[8] Berkeley's figure of 51.8% for 1980 is incorrect.

[9] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 511 (1980). The STATISTICAL ABSTRACT tabulates the statistics for participation in presidential elections since 1932.

1957, a 42.7% turnout; in 1963, 83.3%; and in 1979, 43.1%.[10] Even Berkeley's deployment of statistics fails to demonstrate the requisite nexus between the Ordinance and any compelling governmental interest.[11]

---

[10] Official voter turnout statistics are on file with the office of the City Clerk, Berkeley, California.

[11] Berkeley's citation of statistics that statewide (California) contributions by individuals decreased by 58% between the 1978 and 1980 general elections is also misleading. Appellees' Brief at 7. The November 1978 statewide ballot contained three highly controversial issues concerning smoking in public and private places, homosexual rights and capital punishment. In contrast, the November 1980 statewide ballot presented only one controversial measure. The ratio of contributions in 1978 to 1980 reflects three times as many hotly contested issues on the ballot in 1978; it is no indication of any diminution of interest in or apathy toward the initiative process. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 7, 1978 GENERAL ELECTION G-1 *et seq.*; CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, NOVEMBER 4, 1980 GENERAL ELECTION F-1 *et seq.*

Appellees' allegation that voters tend to reject ballot measures is of no constitutional significance. Appellees' Brief at 11. It is well known that voters tend to reject changes in the status quo embodied in ballot measures which are lengthy, complex, complicated and of uncertain effect. Brestoff, N., *The California Initiative Process: A Suggestion for Reform*, 48 SO. CAL. L. REV. 934-37 (1975).

Appellees also selectively cite certain statistics concerning nineteen Berkeley ballot measure campaigns between 1977 and 1980. Appellees' Brief at 13 n. 29. Contributions over $250 were made in six of the nineteen campaigns; of the remaining thirteen, there were no registered committees (or money spent) with respect to six non-controversial measures, and in five other campaigns money was spent on one side only. Thus, contributions exceeded the $250 limit in six of eight contested campaigns between 1977 and 1980. Interestingly, the side spending the most money was successful in only three of the six contested elections in which contributions exceeded $250.

The side spending the most prevailed as follows:

Year	Issue	Result
1977	Measure B (pro-rent control)	Failed
1979	Measure A (S. African investments)	Passed
1980	Measure E (library relief)	Passed

The side spending the most "lost" as follows:

Year	Issue	Result
1978	Measure I (pro-rent control)	Passed
1978	Measure J (renter property tax benefit)	Failed
1980	Measure D (pro-rent control)	Passed

BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, REPORT ON CAMPAIGN SPENDING IN BERKELEY BALLOT MEASURE CAMPAIGNS 1977-1980 (May 1981) at 4, 13-18, 25, 29-31.

It is intolerable even to suggest that the exercise of first amendment rights is subject to influences that change frequently and unpredictably. Moreover, if statistics show anything at all, it is that voter behavior is unpredictable and influenced by many factors. Voter turnout statistics cannot be used to justify ballot measure contribution limits.

Appellees also attempt to justify the Ordinance on the ground that it would promote citizen involvement in the initiative process. Not only is such argument illogical (*see* page 6, *supra*), but this Court has specifically rejected the claim that the first amendment may be subordinated to an asserted governmental interest of promoting citizen involvement in the ballot measure process:

> Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for " 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times Co.* v. *Sullivan,* 376 U.S., at 266 (quoting *Associated Press* v. *United States,* 326 U.S., at 20).

First National Bank of Boston v. *Bellotti,* 435 U.S. at 790 n. 29.

4. Contribution limits are not the least restrictive means to regulate campaign disclosure.

Appellees cannot justify the Ordinance on the ground that it promotes disclosure. Much of Berkeley's argument emphasizes the need—if fairness in the election process is to be preserved—for prompt disclosure of the names of large contributors, and for regulating the "high-sounding" and "patriotic" names sometimes adopted by political committees. Appellees' Brief at 21-22 and 24-25; *see also* Brief of Santa Monica, California, as Amicus Curiae in Support of Appellees at 8, 13 and 18. Yet, the portion of Ordinance 4700-N.S. here challenged addresses neither of these evils. The remedies for secret

contributions and deceptive names are to require disclosure and accuracy—not to eliminate political committees or to restrict contributions. Virtually the same argument that such "disclosure" is a compelling interest was rejected by a unanimous Fifth Circuit Court of Appeals in *Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980) *appeal docketed* No. 80-970 (Dec. 8, 1980).

Berkeley does not expressly claim that its existing disclosure laws are inadequate even though it implies such by arguing that campaign committees often have titles that mask the true identity of contributors. Appellees' Brief at 21-22.[12] The State of California and the City of Berkeley already have perhaps the most stringent disclosure-requirement laws in the country.[13] Ordinance section 112, J.S. App. at A-58; *see also* Appellants' Brief at 28. Nevertheless, if Berkeley desires, it can solve any alleged disclosure problem without infringing upon the rights of speech and association. For example, Berkeley could regulate, as Congress has done,[14] the titles chosen by campaign committees or require more frequent pre-election publication of the identities of all major contributors to such committees. *Let's Help Florida* v. *McCrary*, 621 F.2d at 200-01; J.S. App. at A-98-99. Berkeley's interest in promoting disclosure of contributions does not justify stifling its citizens' rights of speech and association.

---

[12] *See also* Brief of Santa Monica, Cal., as Amicus Curiae in Support of Appellees at 13-15; Brief in Support of Appellees by Amicus Curiae of City and County of San Francisco at 1-4 and 30.

[13] *See* CAL. GOV'T CODE §§ 84100 *et seq.* and 84200 *et seq.*

[14] See, *e.g.*, 2 U.S.C. § 432(e)(5) (Supp. 1981) and 11 C.F.R. § 102.14(c) (1981).

CONCLUSION

Appellants respectfully submit that the judgment of the court below is erroneous and should be reversed.

Respectfully submitted,

VIGO G. NIELSEN, JR.
Counsel of Record
JAMES R. PARRINELLO
JOHN E. MUELLER
DOBBS & NIELSEN
Attorneys for Appellants

Office-Supreme Court, U.S.
FILED
APR 29 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, AN UNINCORPORATED ASSOCIATION; MASON-MCDUFFIE, A CALIFORNIA CORPORATION; BERKELEY BOARD OF REALTORS, A CALIFORNIA NONPROFIT ASSOCIATION; BETTY GERITZ, MURIEL ROSENKRANZ AND EVA FLOYSTRUP,
APPELLANTS,

v.

CITY OF BERKELEY, CALIFORNIA, A MUNICIPAL CORPORATION; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, HOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, AS MEMBERS OF THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of Amicus Curiae New England Legal Foundation in Support of Appellants.

WILLIAM W. BECKER,
LANDFIELD, BECKER & GREEN,
Suite 1050,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

HARRISON A. FITCH,
ROBERT R. RUDDOCK,
NEW ENGLAND LEGAL FOUNDATION,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

ADDISON C. GETCHELL & SON, INC. · THE LAWYERS' PRINTER · BOSTON

Table of Contents.

Introductory Statement 2

Summary of Argument 4

Argument 4

I. The Berkeley Ordinance Violates First Amendment Freedoms 4

II. There Is No Compelling Governmental Interest to Justify the Restriction Contained in the Berkeley Ordinance 9

III. The Berkeley Ordinance Is Not Closely Drawn to Avoid Unnecessary Abridgment of First Amendment Freedoms 16

Conclusion 18

Table of Authorities Cited.

CASES.

Bates v. Little Rock, 361 U.S. 516 (1960) 9

Buckley v. Valeo, 424 U.S. 1 (1976) 5, 6, 9, 10, 12, 18

C & C Plywood Corporation v. Hanson, 583 F. 2d 421 (9th Cir. 1978) 8

Carey v. Brown, 447 U.S. 455 (1980) 2

Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819 (1980) 10, 14, 17

Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York, 447 U.S. 530 (1980) 2

CSC v. Letter Carriers, 413 U.S. 548 (1973) 11

Elrod v. Burns, 427 U.S. 347 (1976) 9

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 2, 3, 6, 7, 9, 10, 11, 12, 16, 17

Garrison v. Louisiana, 379 U.S. 64 (1964) 6

Hardie v. Eu, 18 Cal. 3d 371 (1976) 10

Let's Help Florida v. McCrary, 621 F. 2d 195 (5th Cir. 1980) 7, 8

Let's Help Florida v. Smathers, 453 F. Supp. 1003 (N.D. Fla. 1978) 7n.

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 18

NAACP v. Alabama, 357 U.S. 449 (1958) 9

NAACP v. Button, 371 U.S. 415 (1963) 9

Pacific Gas and Electric Company v. City of Berkeley, 60 Cal. App. 3d 123 (1976) 5

Pickering v. Board of Education, 391 U.S. 563 (1968) 6

Roth v. United States, 354 U.S. 476 (1957) 6

Schwartz v. Romnes, 495 F. 2d 844 (2d Cir. 1974) 8, 10n.

Thomas v. Collins, 323 U.S. 516 (1945) 16

United States v. Automobile Workers, 352 U.S. 567 (1957) 16

United States v. Harriss, 347 U.S. 612 (1954) 18

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 18

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution, First Amendment 3, 4, 5, 6, 8, 9, 10, 12, 16, 17, 18

Mass. Gen. Laws, c. 55, § 7 2-3

Mass. Gen. Laws, c. 55, § 8 3n., 6, 7

ORDINANCES.

Berkeley, California, Ordinance No. 4700-N.S. § 112 18
§ 206 5n., 17
§ 217 5n.
§ 219 5n.
§ 400, et seq. 18
§ 602 4, 5, 17
§ 605 4, 5

MISCELLANEOUS.

American Enterprise Institute, Referendums (1978) 13n.

American Enterprise Institute, The Referendum Device (1981) 15n.

J. Shockley, The Initiative Process in Colorado Politics: An Assessment (Bureau of Government Research and Services; University of Colorado, Boulder 1980) 15n.

S. Lydenberg, Bankrolling Ballots (Council on Economic Priorities; New York, N.Y. 1979) 14n.

No. 80-737.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, AN UNINCORPORATED ASSOCIATION; MASON-MCDUFFIE, A CALIFORNIA CORPORATION; BERKELEY BOARD OF REALTORS, A CALIFORNIA NONPROFIT ASSOCIATION; BETTY GERITZ, MURIEL ROSENKRANZ AND EVA FLOYSTRUP,
APPELLANTS,

v.

CITY OF BERKELEY, CALIFORNIA, A MUNICIPAL CORPORATION; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, HOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, AS MEMBERS OF THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION,
APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief of Amicus Curiae New England Legal Foundation in Support of Appellants.

Introductory Statement.

New England Legal Foundation (NELF) is a non-profit, tax exempt corporation organized under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on public interest matters. Policy for NELF is set by a Board of Directors composed of New England citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Foundation files this brief in support of the Appellants. Consent has been obtained from the Appellants and the Appellees. Copies of Appellants' and Appellees' letters of consent are on file with the Clerk of this Court. The Foundation adopts Appellants' Statements of Facts, Parties and Issues.

The Foundation has a long-standing interest in First Amendment cases. In 1978, NELF on behalf of the New England Council, Inc. filed an *amicus* brief in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The Court referred to this brief in footnote 22, *id.* at 785. In the 1979 term, the Foundation filed *amicus* briefs in *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980) and *Carey v. Brown*, 447 U.S. 455 (1980).

The Foundation's interest is more than academic or historical. The statutes of the Commonwealth of Massachusetts contain a restriction on individual contributions to a referendum campaign, similar to the limitation in the Berkeley Ordinance presently before the Court.[1] Under Massachusetts

[1] The word "referendum" for the purpose of this brief means any proposal submitted to the voters of any jurisdiction for their approbation, unless a clear contrary intent is evident. "Referendum" includes an "initiative," "ballot question" or "advisory opinion," as well as "referendum."

General Laws chapter 55, section 7 an individual may not contribute more than $1,000 to a political committee which is unaffiliated with a political candidate or party. Mass. Gen. Laws, c. 55, § 7. Organizations created to support or oppose referenda are included in this category of "political committees." Since *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), Massachusetts law does not prohibit or limit contributions or expenditures by corporations to influence the outcome of referenda. There have been attempts, however, in the Massachusetts Legislature to limit corporate contributions.[2]

The Foundation believes that limits on individual contributions to referenda campaigns are unconstitutional. Statutes or ordinances which limit political speech and chill public debate seriously threaten core First Amendment freedoms.

---

[2] There were six proposals submitted to the Massachusetts Legislature in 1981 that dealt with amendments to the Massachusetts statutes regulating campaign contributions. Mass. Gen. Laws c. 55, § 7 and § 8. These were:

H493—a proposal to limit corporate contributions to a political committee for a referendum campaign to $1,000 per election;

H1255—a proposal to keep the $1,000 limit for individual contributions; restrict the number of referendum committees to one on each side of a question; and re-enact the prohibition of corporate contributions and expenditures;

H1257—a proposal that prohibits all expenditures for referenda except those authorized by statute (these funds are to be spent by the constitutional officers of the state);

H6274—a proposal to limit corporate contributions in a referendum to $1,000;

S386—a proposal to limit transfers between political committees to $500 and to limit individual contributions to referenda to $500; and

S405—a proposal to limit individual contributions to referendum committees to $100.

Such statutes by limiting contributions reduce the amount of information to the voters on important public issues. There is no sufficiently compelling governmental interest which justifies restricting speech when citizens act in their sovereign capacity. The First Amendment is designed to insure wide-open, robust debate on public issues. Such debate is essential for intelligent self-government. The Berkeley Ordinance violates the Free Speech Clause of the First Amendment. It should be declared unconstitutional.

Summary of Argument.

Section 602 of the Berkeley Ordinance violates the Free Speech Clause of the First Amendment. It not only limits freedom of speech, it also threatens free and open debate on public issues and, in a highly paternalistic fashion, impairs the rights of the public to hear. The Ordinance cannot survive the strict scrutiny required in constitutional matters. There is no compelling or subordinating governmental interest to justify the limits imposed on free speech by the Ordinance. Moreover, the Ordinance is not the least restrictive scheme necessary to achieve the governmental interests offered as justification for this intrusion into the lives and political discussion of Berkeley citizens.

Argument.

I. The Berkeley Ordinance Violates First Amendment Freedoms.

The Berkeley Election Reform Act of 1974, effective June 4, 1974, governs candidate and referendum elections in the City of Berkeley, California. This Ordinance has been the subject of litigation prior to this case. Section 605 of the

Berkeley Ordinance was enjoined by a trial court in 1974.[3] Section 605 prohibited business entities from making contributions to referendum committees. The California Appeal Court upheld the injunction issued by the trial court because section 605 deprived corporations of "freedom of speech, due process and equal protection" of the laws. *Pacific Gas and Electric Company v. City of Berkeley*, 60 Cal. App. 3d 123, 126 (1976).

Section 602 of the Berkeley Ordinance, here in issue, provides:

> Sec. 602. No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).[4]

While the Berkeley Ordinance limits *contributions*, it contains no restriction on the amount, or type, of *expenditures* a person may make to influence the election of a candidate or a referendum. A restriction on contributions in the election process has been held to violate the Free Speech Clause of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1 (1976). Con-

---

[3] Section 605 of the Berkeley Ordinance states:

> Section 605. No proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, or labor union shall make a contribution to any candidate or committee, directly or indirectly, and no campaign treasurer shall solicit or accept any such contribution.

[4] Other sections of the Ordinance define words in § 602. "Measure" means any initiative, referendum or recall procedure. § 217. "Person" is any individual, business entity, association, committee or other group of persons acting in concert. § 219. "Contribution" means a gift, loan, advance, deposit, etc. made directly or indirectly in aid of, or in opposition to, the qualification for the ballot or voter approval of one or more measures. § 206.

tributions serve First Amendment freedoms by providing the wherewithal for referenda advocacy.

The First Amendment protects political expression in order to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). As this Court recently noted, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). Political speech therefore includes not only discussion of candidates and their qualifications; it also includes speech concerning referenda. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

The public's right to hear has also been recognized as an essential element of the First Amendment where political speech is involved. Nowhere is this right more essential than when public policy decisions are made by the voters through referenda. This Court has recognized that "[t]he public interest in having free and unhindered debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968). Similarly, in *Garrison v. Louisiana*, 379 U.S. 64 (1964) the Court stated:

> [S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." *Id.* at 74-75.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court faced squarely a prohibition of contributions and expenditures in the referendum process. Chapter 55, section 8 of the Massachusetts General Laws prohibited

corporations from contributing or expending money to influence referenda unless the referenda "materially affected" the corporation. Mass. Gen. Laws, c. 55, § 8. The Court held the statute unconstitutional and said that the activities restricted by the statute are "the type of speech indispensable to decisionmaking in a democracy. . . ." *First National Bank of Boston v. Bellotti,* 435 U.S. at 777. The Court rejected limitations on both contributions and expenditures, because for referenda both types of spending serve to inform and educate the electorate.

Recently, in *Let's Help Florida v. McCrary,* 621 F. 2d 195 (5th Cir. 1980), the Fifth Circuit, faced with a constitutional challenge to a Florida statute strikingly similar to the Berkeley Ordinance, stated:

> . . . when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the First Amendment. *Id.* at 200.[5]

---

[5] The Federal District Court for the Northern District of Florida discussed in a footnote the differences between a contribution to a candidate and a contribution to a referendum campaign committee. The Court said:

> Under the circumstances of this case the distinction of whether the speech is that of plaintiff or that of a contributor may lose its significance. Let's Help Florida is organized for the purpose of supporting a single issue. Unlike a candidate for office with many issues to discuss, plaintiff can concentrate its efforts on one theme and in this regard a contribution may be more directly transformed into speech. *The committee could therefore be viewed as a conduit for the speech of the contributor directed to a single goal. Let's Help Florida v. Smathers,* 453 F. Supp. 1003, 1011, n.7 (N.D. Fla. 1978). (Emphasis supplied.)

The decision of the California Supreme Court is directly against the weight of legal authority. The Second, Fifth and Ninth Circuits have uniformly held that restrictions on both contributions and expenditures in a referendum are unconstitutional. *Let's Help Florida v. McCrary*, 621 F. 2d 195, 200 (5th Cir. 1980); *C & C Plywood Corporation v. Hanson*, 583 F. 2d 421, 424-25 (9th Cir. 1978); and *Schwartz v. Romnes*, 495 F. 2d 844, 852-53 (2d Cir. 1974).[6]

Contributions made to influence referenda are essential to the discussion of public issues and government policies. In the area of referenda spending this Court has not differentiated between contributions and independent expenditures. Referenda contributions and expenditures serve core First Amendment functions by providing information to voters so that they may exercise their franchise intelligently. The Berkeley Ordinance restricts the amount of contributions that an indi-

---

[6] In *C & C Plywood Corporation v. Hanson*, 583 F. 2d 421 (9th Cir. 1978), the Ninth Circuit, in determining the constitutionality of a Montana statute which prohibited corporate spending concerning a referendum, said:

> Although the relevant statute in *Bellotti* forbade both contributions and expenditures by corporations, the Court did not distinguish between the two activities in deciding that the statute was unconstitutional. It did, however, draw a clear distinction between ballot issues and partisan elections. *Id.* at 424-25.

In *Let's Help Florida v. McCrary*, 621 F. 2d 195 (5th Cir. 1980), the Fifth Circuit, in determining the constitutionality of a Florida statute which restricted to $3,000 the amount of contributions by an individual to a referendum committee, said:

> The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers—in this case, the voters themselves—except in a manner protected by the first amendment. *Id.* at 199-200.

vidual may make in support of or in opposition to a referenda. Thus, the Berkeley Ordinance directly violates the First Amendment right of free speech and inhibits the unfettered discussion of political issues which is the life blood of representative democracy.

II. There Is No Compelling Governmental Interest to Justify the Restriction Contained in the Berkeley Ordinance.

Governmental activity in the area of the First Amendment is subject to a standard of strict scrutiny. *NAACP v. Alabama,* 357 U.S. 449 (1958). First Amendment rights can be restricted or prohibited but only when the state demonstrates a sufficiently compelling interest in the regulation. *Bates v. Little Rock,* 361 U.S. 516 (1960). The state must employ means narrowly drawn to avoid unnecessary interference with First Amendment guarantees. *Buckley v. Valeo,* 424 U.S. 1, 25 (1976). Moreover, the burden is on the government to show the existence of such an interest. *Elrod v. Burns,* 427 U.S. 347, 362 (1976). This strict and demanding review is essential because "First Amendment freedoms need breathing space to survive. . . ." *NAACP v. Button,* 371 U.S. 415, 433 (1963).

The Berkeley Ordinance limits the amount of money a person, group or business entity may contribute to a committee or organization supporting or opposing a referendum. Contributions and expenditures are basic First Amendment activities. *Buckley v. Valeo,* 424 U.S. 1, 14 (1976). Limitations on such activities seriously threaten a fundamental purpose of the First Amendment—" 'the liberty to discuss publicly and truthfully all matters of public concern. . . .' " *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978). Every governmental interest cited by the Court below to jus-

tify the Berkeley limitation of First Amendment rights has previously been rejected by this Court, as well as by a number of Circuit Courts.[7]

The California Supreme Court asserts that limits on contributions to referenda are constitutional because unlimited contributions have the potential to corrupt the electoral process. The Court below relied on *Buckley v. Valeo*, 424 U.S. 1 (1976), for precedent that restrictions on contributions to referendum campaigns are constitutional because such contributions are a "valid means of dealing with undue influence by moneyed interests in the electoral process." *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 823 (1980), quoting from *Hardie v. Eu*, 18 Cal. 3d 371, 378 (1976). The Court's reliance on *Buckley* is plainly wrong and underscores its failure to observe the distinction between candidate elections and referenda. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 787-88 (1978).

In *Buckley* this Court said that the integrity of our representative democracy is undermined to the extent that large contributions are given to secure political *quid pro quo's* from current and potential office holders. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). The *Buckley* Court cited the disturbing examples that surfaced after the 1972 presidential election which demonstrated that the Court's concern for the integrity of the electoral process was not illusory. *Id.* at 27. The Court also determined that the "appearance of corruption," which could be inferred from the public's awareness that elected officials and candidates receive large contributions, was a sufficiently compelling governmental reason to restrict contributions. The Court stated, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in a sys-

[7] See note 6 and *Schwartz v. Romnes*, 495 F. 2d 844 (2d Cir. 1974).

tem of representative Government is not to be eroded to a disastrous extent.' " *Id.* at 27, quoting from *CSC v. Letter Carriers,* 413 U.S. 548, 565 (1973). This concern for the integrity of the electoral process and representative government is the direct result of the effect large contributions presumably have on officeholders and candidates for public office.

The California Supreme Court's assertion that contributions to a ballot question election have the same potential for corruption of the electoral process as do contributions to candidate elections has already been disposed of by the Supreme Court. In *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978) the Court stated:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. *Id.* at 790. (Citations omitted.)

The Court in *First National Bank* did not dismiss the effect unrestricted spending has on the electoral process or on the faith the people place in that process. The Court stated that preserving the integrity of the electoral process, preventing corruption and sustaining the active responsibility of the individual citizen are governmental interests of the highest importance. *Id.* at 788-789. The Court concluded, however, that the proponents of the Massachusetts statute, there in issue, failed to demonstrate by record or legislative findings that corporate advocacy, or advocacy by wealthy and powerful organizations which spend more money than their opponents, threatened *imminently* to undermine democratic process of referenda. *Id.* at 789.

Here, the City of Berkeley presented no evidence that voter confidence was eroded by unlimited contributions in the referenda process. Such contributions create no danger of reciprocal obligations from an elected official to a major contributor. The right of the public to be informed is of paramount concern in preserving the free exchange of ideas in the electoral process. This right should not be curtailed on supposition alone.

The California Supreme Court also relied on a series of quotations from selected articles by social scientists to support its claim that unlimited contributions threaten the electoral process. This is hardly a forceful demonstration that unlimited contributions undermine the integrity of the referendum process. In fact, there is no empirical data to support the proposition that unrestricted spending, either through contributions or expenditures, undermines the confidence of the citizens in the referenda process.

Spending to influence the voters on a referendum, usually from *contributed* funds, buys the copywriting, printing, distribution and media time essential to convey information to the voters. Indeed, unlike a candidate election where a "person" is the basis of the campaign effort and that "person" can speak for himself, a referendum cannot speak on its own behalf. Money is essential to a referendum effort because "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo,* 424 U.S. 1, 19 (1976). The ability to speak to the voters and the voters' right to hear are precisely the functions the First Amendment is designed to protect. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978).

While scholarly research on the influence of larger contributions to referenda campaigns is inconclusive, the side which spends the most money does not always prevail. In California, from 1972 to 1976, six of the eight measures on

which advocates spent more than their opponents were defeated. In the same time period, opponents spending the most money were successful six out of eight times.[8] In sixteen ballot questions in California from 1972 to 1976, the side which spent the most money prevailed in only eight races.[9] These findings are supported by recent referenda in Massachusetts.

In 1980 the Massachusetts voters were presented with a ballot question which limited yearly property tax liability to 2½% of the assessed valuation. The ballot question, "Proposition 2½," was the subject of substantial spending by a number of interest groups. Two primary committees emerged to support the measure. One of these was almost totally financed with corporate contributions in the amount of $270,000. The other was funded by the contributions of individuals and small business in the amount of $158,000. Together the proponents of "Proposition 2½" spent $432,000. The main committee in opposition to the question raised and spent $561,000. Thus, the opponents of "Proposition 2½" outspent the proponents by a margin of almost $130,000.[10]

---

[8] American Enterprise Institute, *Referendums* (Washington, D.C. 1978), pp. 104-105.

[9] *Id.*

[10] Review of documents in the Massachusetts Office of Campaign and Political Finance revealed the following:

Proponents:	
Citizens for Limited Taxation	157,908.86
Concerned Citizens for Lower Taxes	270,985.00
Citizens for 2½ Brockton	3,377.00
Total	432,270.86
Opponents:	
Vote No on Question 2	544,358.48
Metropolitan Vote No on Question 2 Committee	16,408.10
Total	560,766.58

Opponents also included a number of committees organized at the municipal level. Their spending was insignificant.

Nevertheless, "Proposition 2½" was overwhelmingly approved by the voters in the November election of 1980.[11]

Two years earlier, however, the result was different. In 1978 Massachusetts voters considered an amendment to the state constitution which proposed to establish four classes of real property for taxation purposes. This question was in response to a court ruling that required each city and town to rectify an historic imbalance between assessments of residential and business properties. The opponents spent $550,000. The proponents spent $900,000. The measure passed 1,285,865 to 649,400.[12]

These two recent examples in Massachusetts bear out the California experience from 1972-1976 that the effect of money on referenda is difficult to quantify. In fact, there are many reasons for success or defeat of a referendum. These include: how the money was spent; the creation of coalitions (including political parties and newspaper endorsements); and the nature of the issues themselves.

Despite the lack of evidence that money buys referenda elections, the California Court asserts that there is a "nexus between voter apathy and large campaign contributions." *Citizens Against Rent Control v. City of Berkeley,* 27 Cal. 3d at 828 (1980). The Court cites one, and only one, work for the proposition that voters are alienated because of large contributions. *Id.* The attitude polls used in that work concerned faith in the overall electoral system. Voters' attitudes about

---

[11] According to the Massachusetts Secretary of State's Office, Election Division, the statewide vote on "Proposition 2½" in November, 1980 was:

For passage	1,503,771
Against passage	758,978

[12] S. Lydenburg, *Bankrolling Ballots* (Council on Economic Priorities 1979), p. 69.

the effect of money on referenda were not surveyed.[13] Moreover, three different polls were used. The attitudes expressed in one poll may not correlate to the attitudes expressed in the others. It is not clear if the people who felt powerless also felt that contributions should be limited or if they were less likely to vote because money was spent on referendum campaigns.

Aside from the problems with the source cited by the Court, the Court itself repudiates the theory no less than a few lines later in its opinion. Referring to another political scientist who analyzed referenda in Colorado, the California Court states:

> "This study did not find Colorado citizens apathetic, cynical, or ignorant towards the initiatives. The majority of people were interested in the issues and did have ideas on them." *Id.* at 828.[14]

---

[13] Analysis of aggregate voting patterns is not an accurate method of revealing the reasons why voters make decisions. The reasons a person votes or does not vote are myriad. Numerous reasons exist for low voter turnout, not the least of which could be a reaction against referenda generally. *The Denver Post,* Editorial, Nov. 21, 1976, p. 21, cited by John Shockley in *The Initiative Process in Colorado Politics: An Assessment,* see note 14. Moreover, the decision by the voter on a referendum is "influenced by currents of conservatism and liberalism, by socioeconomic status, by age and race, by urban or rural residence, and—related to all of these—by party affiliation." American Enterprise Institute, *The Referendum Device* (Washington, D.C. 1981), p. 57.

The best method for assessing whether contributions undermine voter confidence would require sophisticated polling. Such a survey would have to focus on referenda and not simply money in politics. Such a study must involve more than one time frame and include several referenda situations. It would also have to analyze the relationships between voting habits, "powerlessness" and confidence in the referenda process. Such a study has never been done.

[14] See also, J. Shockley, *The Initiative Process in Colorado Politics: An Assessment* (Bureau of Governmental Research and Services, Boulder, Colorado 1980).

It would appear that, in regard to referenda, some voters, at least in Colorado, do not share the California Court's loss of confidence in the process.

There is no doubt that "Preserving the integrity of the electoral process, preventing corruption and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978), quoting *United States v. Automobile Workers*, 352 U.S. 567, 575 (1957). But, here there has been no showing that large contributions to referenda pose any threat to the confidence of the citizenry in the referendum process. The arguments of the California Supreme Court are simply not persuasive. As this Court has noted:

> ... [a] restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

III. The Berkeley Ordinance Is Not Closely Drawn to Avoid Unnecessary Abridgment of First Amendment Freedoms.

The Court below asserts that unlimited contributions constitute a threat to the referendum process sufficiently com-

---

Mr. Shockley observes in this work that "the initiative process galvanized, motivated, and interested the voters." In a Colorado election where a great deal of money was spent, he states, "more people voted on each of the ten ballot propositions than voted in state legislative races, regents races, and judicial retention elections." Indeed, in a few instances, "more people voted on a particular initiative than voted for president of the United States." *Id.* at 2-3.

pelling to justify the City's effort to limit political speech. This purpose is contradicted, however, by section 602 which is, at once, over and underinclusive. Section 602 of the Berkeley Ordinance is simply not the least restrictive method to avoid corruption of the electoral process.

In at least one important respect section 602 of the Berkeley Ordinance is overinclusive. The section purports to restrict contributions to a limit of $250 from individuals and business entities. The California Court points out that "no restriction is placed on the right of individuals or corporate members to volunteer their *services* in a ballot measure campaign." *Citizens Against Rent Control v. City of Berkeley,* 27 Cal. 3d at 829-30 (1980). Although this appears to be even-handed, it is not. Corporations are treated differently.

Section 206 of the Ordinance defines "contributions" as including "service or labor for which a payment is made." It is impossible for a corporation or business entity to perform services or labor except by paying for them. Unlike an individual who could volunteer his labor or service, these activities would be considered "contributions" when made by a corporation and subject to the $250 limit contained in section 602. This Court has previously rejected unequal treatment of businesses and individuals under the First Amendment. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776-77 (1978). The rejection of differences in regulating the exercise of free speech was predicated on whether the speech is the type protected by the First Amendment. This Court said that speech concerning referenda is protected by the First Amendment regardless of its source. *Id.* at 776. This unequal treatment reveals that the Ordinance is not closely drawn to avoid unnecessary abridgment of First Amendment freedoms.

A more precise governmental provision in this area, for example, would be a disclosure requirement that identifies the

source of contributions, and provides information which voters could use to judge the credibility of the messages in a referendum campaign. Ironically, the Berkeley Ordinance contains extensive disclosure requirements. § 400, *et seq.* The Ordinance also contains a requirement that the city publish twice, within seven days of an election, a list of all contributors of over fifty dollars to all candidates or committees. § 112. These reporting and publishing requirements are intended to insure that the voters are aware of who is trying to influence their decision. This Court has approved such disclosure requirements. *Buckley v. Valeo,* 424 U.S. 1, 66-67 (1976) and *United States v. Harriss,* 347 U.S. 612, 625-26 (1954).

More important, disclosure, unlike a contribution limitation, reinforces First Amendment freedoms. It avoids the "paternalism" of governmental limits of political speech. The Supreme Court has always opted for more speech rather than less speech. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976) and *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 (1977).

Conclusion.

Free and uninhibited debate on public issues is essential in a democracy. The First Amendment guarantees the people the right to speak about public issues and to hear all viewpoints. The First Amendment is designed to facilitate reasoned, intelligent self-government. Nowhere is the guarantee of free speech more essential than when the voters directly determine governmental action and policy in the referenda process. Unrestricted and undiminished information is vital to the referenda process so that voters can exercise their decision-making powers intelligently. The Berkeley Or-

dinance by limiting contributions reduces the amount of information available to the people. The Berkeley Ordinance, instead of insuring voter confidence, distorts the political process, usurps the right of the electorate to make decisions for itself and makes intelligent self-government impossible.

The danger that this case presents to the right of the people to engage in direct legislative action through the referendum process requires a clear statement by this Court that the public's right to wide-open, robust debate may not be impaired.

Respectfully submitted,

By its Attorneys,

WILLIAM W. BECKER,
LANDFIELD, BECKER & GREEN,
Suite 1050,
1819 H Street, N.W.,
Washington, D.C. 20006.
(202) 293-1919

HARRISON A. FITCH,
ROBERT R. RUDDOCK,
New England Legal Foundation,
110 Tremont Street,
Boston, Massachusetts 02108.
(617) 482-1410

Dated April 24, 1981.

Office-Supreme Court, U.S.
FILED
APR 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DeVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY AS AMICUS CURIAE

MALCOLM H. FURBUSH
ROBERT OHLBACH
JOHN B. GIBSON
JOSEPH I. KELLY
ROBERT L. HARRIS
PATRICK G. GOLDEN

Counsel for Amicus Curiae

PACIFIC GAS AND ELECTRIC COMPANY
77 Beale Street
P.O. Box 7442
San Francisco, CA 94106
(415) 781-4211

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Consent for Filing	2
Question Presented	2
Interest of the Amicus Curiae	2
Statement of the Case	3
Argument	5
I. The Decision Of The Court Below Infringes Upon Constitutionally Protected Free Speech Rights	5
A. Limiting The Amount A Person Can Contribute To A Committee In A Ballot Election Is A Direct Restraint Upon Free Speech And Political Association	5
B. There Is No Compelling Governmental Interest In Limiting The Amount Of Money A Person Can Donate To A Committee To Support Or Oppose A Ballot Measure	9
1. A City Must Demonstrate A Compelling Governmental Interest In Limiting Campaign Donations To A Committee In A Ballot Measure Election	9
2. The Governmental Interest Allegedly Served By The Berkeley Ordinance Is Illusory	15
II. The First Amendment Prohibits Government From Limiting The Speech Of Some In Order To Enhance The Voices Of Others	19
III. Berkeley's Ordinance Limiting The Amount That May Be Contributed To A Campaign Committee Places An Impermissible Restraint Upon The Right Of Voters To Receive Information From All Sources	22
IV. Section 602 Of The Ordinance Denies Equal Protection Of The Law To Those Who Pool Their Resources To Communicate Their Political Views	25
Conclusion	29

TABLE OF AUTHORITIES

CASES	PAGES
Abrams v. *United States*, 250 U.S. 616 (1919)	6
Bare v. *Gordon*, 84 Wash.2d 380, 526 P.2d 379 (1974)	14
Bates v. *Little Rock*, 361 U.S. 516 (1960)	9
Buckley v. *Valeo*, 424 U.S. 1 (1976)	5, 6, 7, 8, 9, 10, 17 19, 20, 21, 24, 25
Citizens Against Rent Control v. *City of Berkeley*, 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979)	1
Citizens Against Rent Control v. *City of Berkeley*, 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980)	1, 7, 10 11, 12, 15, 18, 19 20, 23, 26, 27, 28
Cohen v. *California*, 403 U.S. 15 (1971)	16, 17
Cousines v. *Wigoda*, 419 U.S. 477 (1975)	6
CSC v. *Letter Carriers*, 413 U.S. 548 (1973)	7
Deras v. *Myers*, 535 P.2d 541 (Ore. 1975)	14
Elrod v. *Burns*, 427 U.S. 347 (1976)	10
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978)	13, 17, 18 21, 22, 23, 24
Gitlow v. *New York*, 268 U.S. 652 (1925)	6
Hall v. *Beals*, 396 U.S. 45 (1969)	26
Johnson v. *Hamilton*, 15 Cal.3d 461 (1975)	26
Kusper v. *Pontikes*, 414 U.S. 51 (1974)	6
Let's Help Florida v. *McCrary*, 621 F.2d 195 (5th Cir. 1980)	16, 18, 20
Louisiana v. *NAACP*, 366 U.S. 293 (1961)	9
Meyer v. *Nebraska*, 262 U.S. 390 (1923)	23
Mills v. *Alabama*, 384 U.S. 214 (1966)	5
NAACP v. *Button*, 371 U.S. 415 (1963)	9, 10
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	10
Pacific Gas and Electric Company v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976)	3
Police Department of the City of Chicago v. *Mosley*, 408, U.S. 92 (1972)	28
Reynolds v. *Simms*, 377 U.S. 533 (1964)	25
Roth v. *United States*, 354, U.S. 476 (1957)	5
Schneider v. *Irvington*, 308 U.S. 149 (1939)	10
Schwartz v. *Romnes*, 495 F.2d 844 (2nd. Cir. 1974)	13, 15
Shapiro v. *Thompson*, 394 U.S. 618 (1969)	27
Sherbert v. *Verner*, 374 U.S. 398 (1963)	25

CASES — PAGES

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 25
Stanley v. *Georgia*, 394 U.S. 557 (1969) 23
Thomas v. *Collins*, 323 U.S. 516 (1945) 6, 10
Thompson v. *Mellon*, 9 Cal.3d 96 (1973) 26
Thornhill v. *Alabama*, 310 U.S. 88 (1940) 5, 10
Weber v. *City Council*, 9 Cal.3d 950 (1973) 26
Welford v. *Battaglia*, 343 F.Supp. 143 (Del. 1972) 10

CONSTITUTION

United States Constitution First Amendment ... 2, 3, 4, 5, 6, 8, 9, 10 19, 23, 24, 25, 28, 29

STATUTES

Berkeley, Cal., Berkeley Election Reform Act of 1974, Ordinance 4700-NS 2, 3, 4, 5, 10, 13, 15, 16 18, 19, 21, 25, 26, 27, 28
28 U.S.C. Section 1257(2) 2

TEXTS

Clagett and Bolton, *Buckley* v. *Valeo*, 29 Vand.L.Rev. 1327 (1976) 13
Comment, The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns, 13 U.S.F.L. Rev. 145 (1978) 10
Developments in the Law—Equal Protection (1962), 82 Harv.L. Rev. 1064, 1120-1131 25
Ely (1970), Legislature and Administrative Motivation In Constitutional Law, 79 Yale L.J. 1205 10
Ely, The Supreme Court, 1977 Term, 92 Harv.L.Rev. 5, 163 (1977) 13, 23
Note, Less Drastic Means and the First Amendment (1969), 78 Yale L.J. 464 10
Note, The Unconstitutionality of Limitations on Contributions to Political Committees In the 1976 Federal Election Campaign Act, 86 Yale L.J. 9531 (1977) 13
Radabaugh, Tendencies of California Direct Legislation (1961) *Id.* at 179 12
Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U.L. Rev. 900 (1971) 13
Shockley, The Initiative, Democracy and Money: The Case of Colorado (1976), Printed in Hearings Before the Subcommittee on the Constitution of Sen. Com. on Judiciary on S.J. Res. 67, 95th Cong., 1st Sess., at pp. 188-189 (1977) 12
Tribe, American Constitutional Law 22, 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DeVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court is reported at 27 Cal.3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion of the California Court of Appeal is reported at 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979).

JURISDICTION

The petition noting probable jurisdiction was filed on November 5, 1980, and probable jurisdiction was noted by this Court on February 23, 1981. The Jurisdiction of the Court is pursuant to Title 28, U.S.C., section 1257(2).

CONSENT FOR FILING

This Amicus Curiae brief is being filed with the written consent of all parties to the proceedings.

QUESTION PRESENTED

Whether a city may, consistent with the First Amendment to the United States Constitution, limit the amount of money a person may contribute to a campaign committee which either supports or opposes a ballot measure in an election.

INTEREST OF THE AMICUS CURIAE

Pacific Gas and Electric Company (PGandE) is one of the world's largest investor-owned combined gas and electric utilities. Incorporated in California in 1905, it serves 48 of California's 58 counties.

For more than 75 years, PGandE has owned and operated an integrated system serving the inhabitants of Berkeley and adjoining communities with electricity. In April 1973, the City of Berkeley voted on an intiative measure which asked its voters whether the City of Berkeley should condemn the electric facilities of PGandE and operate said facilities itself. By a substantial majority, the voters rejected the proposal for the City to take over and operate the PGandE electric facilities.

On June 4, 1974, the voters of the City of Berkeley passed Municipal Ordinance No. 4700-NS (Election Reform Act of 1974) making it a crime for PGandE or any other business entity to make any expenditures or contributions in connection with a Berkeley municipal election. Shortly, thereafter, on August 8, 1974, the Berkeley City Council placed on the November 5, 1974 municipal ballot Measure "W" requiring the acquisition by the City of Berkeley of PGandE's electric distribution facilities.

Obviously, PGandE was vitally concerned with the proposed forced acquisition of its business and assets in Berkeley, but because of the Berkeley Election Reform Act of 1974, it was precluded from communicating its views on Measure "W." Consequently, on August 27, 1974, PGandE filed a complaint in the Alameda County Superior Court seeking injunctive and declaratory relief alleging that the Berkeley ordinance violated its right to the equal protection of the law and its right of free speech as guaranteed under the California Constitution and the First Amendment to the United States Constitution.

On August 27, 1974, the court issued a temporary restraining order prohibiting enforcement of the ordinance against PGandE. A preliminary injunction was issued on September 19, 1974, and a permanent injunction was granted on October 15, 1974. At the November 5, 1974, election the Berkeley voters again rejected the city's bid to acquire the electric facilities of PGandE.

On appeal to the California Court of Appeal, the court, in an unanimous decision, held those provisions of the Election Reform Act prohibiting PGandE from expending money to communicate its view to the voters to be unconstitutional. *Pacific Gas and Electric Company* v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976).

Since 1974, and to the present, there has been a continuing interest in Berkeley in acquiring PGandE's electric facilities. Therefore, PGandE, whose electrical facilities have been the subject of two prior elections, has a vital interest in the enforcement of section 602[1] of the Berkeley ordinance, which limits to $250 the amount a person may donate to a committee formed either to support or oppose a ballot measure.

STATEMENT OF THE CASE

At the April 9, 1977, Berkeley municipal election, the electorate voted on Measure "B," a proposal to amend the city's

[1] Section 602 reads as follows:

No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

charter to create a rent control board that was empowered to set the rates for most rental units in the city.

The measure created considerable controversy in Berkeley and some of its opponents formed an unincorporated association known as Citizens Against Rent Control (CARC) who are the appellants in this case. CARC hired a campaign consultant, engaged in extensive research, published campaign literature, solicited and accepted campaign contributions and generally conducted an active campaign against the measure.

Before the election, a controversy arose concerning Berkeley's intent to enforce the contribution limit contained in section 602. According to CARC, it believed that the city had advised campaign committees that it was not going to enforce section 602; and relying upon that belief, CARC solicited and received a total of $18,600 in contributions, several of which exceeded the $250 limit.

Shortly before the election, the Berkeley Fair Campaign Practices Commission ordered CARC, pursuant to section 604 of the Ordinance, to pay the $18,600 to the general fund. CARC responded by filing a complaint in the Alameda County Superior Court for injunctive and declaratory relief alleging that section 602 was violative of its First Amendment rights and those of other named plaintiffs who desired to make contributions larger than $250. The Superior Court granted a preliminary injunction against enforcement of section 602.

At the Superior Court hearing, CARC submitted uncontroverted evidence in the form of affidavits and declarations that the $18,600 was necessary to conduct an effective campaign against Measure "B;" that CARC solicited and received contributions in excess of $250; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the uncertainty of the application of the restrictions imposed by section 602; that to conduct an effective campaign against the complex rent control measure, extensive research and voter contact had to be achieved; and that an experienced professional campaign manager had to be hired in order to conduct the election campaign.

On the other hand, the only evidence submitted by the City of Berkeley was the declaration of Edythe Campbell, City Clerk of Berkeley, who merely stated that the Berkeley Fair Campaign Practices Commission had demanded that CARC surrender the $18,600. No proof was offered to show a compelling governmental interest to justify section 602's severe infringement on First Amendment rights.

The Alameda County Superior Court's decision was appealed, and that decision was upheld by the California Court of Appeal. Thereafter, upon appeal to the California Supreme Court, the trial court was reversed. The California Supreme Court held that section 602 served a compelling governmental interest.

ARGUMENT

I

THE DECISION OF THE COURT BELOW INFRINGES UPON CONSTITUTIONALLY PROTECTED FREE SPEECH RIGHTS.

A. Limiting The Amount A Person Can Contribute To A Committee In A Ballot Election Is A Direct Restraint Upon Free Speech And Political Association.

In a democratic society, it is essential that people have the right, free of governmental control, to communicate their views on issues of importance to them. The Berkeley ordinance operates "in an arena of the most fundamental First Amendment activities." *Buckley* v. *Valeo,* 424 U.S. 1, 14 (1976). It is now elementary that the First Amendment provides the broadest protection to political expression in order "to assure [the]unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354, U.S. 476, 484 (1957). A major purpose of the First Amendment is "to protect the free discussion of governmental affairs. . . ."[2] *Mills* v. *Alabama,* 384 U.S. 214, 218 (1966).

---

[2] This Court has on occasions too numerous to mention affirmed that First Amendment freedoms are essential for all in a democratic society. For as stated in *Thornhill* v. *Alabama* (1940) 310 U.S. 88, 95-96:

(footnote continued on following page)

Limiting the amount of money a person may contribute to a committee composed of others who have similar political beliefs is a direct and unconstitutional infringement upon First Amendment freedoms that are essential for effective political expression. As stated by the Court in *Buckley* v. *Valeo, supra,* at p. 15:

> The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP* v. *Alabama,* 375 U.S. 449, 460 (1958), stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee '"freedom to associate with others for the common advancement of political beliefs and ideas,"' a freedom that encompasses '"[t]he right to associate with the political party of one's choice."' *Kusper* v. *Pontikes,* 414 U.S. 51, 56, 57 (1973), quoted in *Cousines* v. *Wigoda,* 419 U.S. 477, 487 (1975).

The California Supreme Court erroneously concluded that the Berkeley ordinance was a valid limitation upon campaign

---

(footnote continued from preceding page)

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be *exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth.* Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. (Emphasis added.)

Five years later, this Court, in *Thomas* v. *Collins* (1945) 323 U.S. 516, 537 left no doubt that:

> The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. *Cf. Abrams* v. *United States,* 250 U.S. 616, 624 (1919), and *Gitlow* v. *New York,* 268 U.S. 652, 672 (1925), dissenting opinions of Mr. Justice Holmes. Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

contributions. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 830. This error stemmed from the court's improper reliance upon *Buckley* v. *Valeo, supra,* for the proposition that a campaign contribution limitation is constitutionally valid. According to the court below:

> CARC's assertion that its right to engage in effective political advocacy is affected by a contribution ceiling is answered by the decision in *Buckley.* The high court recognized the constitutional problems that would result if a contribution limit did prevent effective advocacy, but stated: 'The overall effect of the Act's contribution ceiling is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds, on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.' (424 U.S. at pp. 21-22 [46 L.Ed.2d at p. 689].) *Id.,* at 830.

While it is true that the *Buckley* Court upheld a limitation upon campaign contributions to a political candidate, it did *not* validate such limitations when applied to a *ballot* measure. Extending the holding of *Buckley* to ballot measures is a gross misreading of that case. The most obvious error of the court below is that it confused campaign contributions to candidates with campaign contributions to ballot measures and reasoned incorrectly that there is no substantial distinction between the two.

Contrary to this belief, *Buckley* does not stand for the proposition that donations to a campaign committee in a ballot election may be limited. In *Buckley* v. *Valeo, supra,* this Court, citing *CSC* v. *Letter Carriers,* 413 U.S. 548 (1973), expressed concern about the danger that large campaign donations may have on corrupting a politician (or creating the appearance thereof):

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the

> opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC* v. *Letter Carriers, supra,* the Court found that the danger to 'fair and effective government' posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. *Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'* 413 U.S., at 565. *Buckley* v. *Valeo, supra,* at 27. (Emphasis added.)

After applying the rigorous standards of review necessary for infringing free speech, the *Buckley* Court concluded that "the weighty interests served by restricting the size of financial contributions to *political candidates* are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Buckley* v. *Valeo, supra,* at 29 (emphasis added). However, this rationale does not apply to ballot measures.

A more appropriate analysis, insofar as ballot measures are concerned, would be an analogy to the part of the *Buckley* decision where the Court struck down campaign spending limitations because they imposed an impermissible restraint upon free speech and did not serve a sufficient governmental interest in curbing corruption of politicians:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, section 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Buckley* v. *Valeo, supra,* at 47.

Thus, the reliance of the California Court upon *Buckley* to support its conclusion that limitations may be placed upon the amount donated to a campaign committee concerning a ballot measure is wholly misplaced.[3]

B. There Is No Compelling Governmental Interest In Limiting The Amount Of Money A Person Can Donate To A Committee To Support Or Oppose A Ballot Measure.

1. A City Must Demonstrate A Compelling Governmental Interest In Limiting Campaign Donations To A Committee In A Ballot Measure Election.

First Amendment freedoms occupy a "preferred position" and cannot be infringed unless the city demonstrates a compelling interest. See *Louisiana* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 367 U.S. 499 (1958).

In *NAACP* v. *Button*, 371 U.S. 415 (1963), this Court noted that:

> The decisions of this Court have consistently held that only a compelling state interest . . . can justify limiting First Amendment freedoms. . . . In *NAACP* v. *Alabama*, 357 U.S. 449, 461, we said, 'In the domain of these indispensable liberties, whether of speech, press or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.' Later, in *Bates* v. *Little Rock*, 361 U.S. 516, 524 [1960], we said '[w]here there is significant encroachment upon personal liberty, the State may prevail only upon showing of a subordinating interest which is compelling. Most recently, in *Louisiana ex rel Gremillion* v. *NAACP*, 366

[3] The California Court's authority for its conclusion is based upon a law student's incorrect reading of *Buckley*. (See Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns*, 13 U.S.F.L. Rev. 145 (1978). The student based her conclusion, that corporate contributions to a ballot measure campaign may be prohibited, on a faulty premise. Contrary to the assertions in the law review commentary, nothing in *Buckley* suggests that the electorate may be corrupted by its receipt of information from corporate sources. *Buckley* dealt with the possible *quid pro quo* effects that contributions may have on candidates. The *quid pro quo* rationale does not apply to ballot measures.

U.S. 293, 297, we reaffirmed this principle: '. . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.' *Id.*, at 438-439.

When First Amendment rights are at stake, as in the instant case, the normal presumption of the constitutionality of a statute does not apply if on its face or as applied, it infringes the exercise of First Amendment rights.[4] See *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Schneider* v. *Irvington*, 308 U.S. 149 (1939).

Thus, once it is established that the Berkeley ordinance infringes First Amendment rights, the city bears the heavy burden of showing the existence of a compelling governmental interest sufficient to justify its campaign contribution limit.[5] This burden was not met by the city in the trial court.

---

[4] The burden of showing a compelling state interest so fundamental and overriding as to necessitate prohibiting a person from donating more than $250 to a campaign committee lies with the City of Berkeley. (*Elrod* v. *Burns*, 427 U.S. 347 (1976); *NAACP* v. *Button*, 371 U.S. 415, 438-439 (1953); *Welford* v. *Battaglia*, 343 F.Supp. 143, 145 (Del. 1972); see also, Note, *Less Drastic Means and the First Amendment* (1969) 78 Yale L.J. 464; Ely (1970) *Legislature and Administrative Motivation In Constitutional Law* 79 Yale L.J. 1205.)

The fundamental purpose underlying the free speech guarantee is the national commitment to the principle "that debate on public issues should be uninhibited, robust and wide-open" (*New York Times* v. *Sullivan*, 376 U.S. 254, 270) (1964), so that the public may be informed and educated on all views regardless of source.

[5] The court below conceded that strict scrutiny is the appropriate test to be applied in this case:

> Berkeley's first contention is that CARC and the other plaintiffs have failed to show infringement of their First Amendment rights so as to require it to demonstrate that section 602 serves a compelling governmental interest by the least restrictive means. CARC responds that certain affidavits before the trial court furnished adequate evidence both that its ability to engage in effective political advocacy was impaired and the associational rights of its contributors were significantly controlling federal decisions appear to hold that monetary restrictions on election campaigns will be deemed to require strict scrutiny. Thus in *Buckley* the court differentiated contribution from expenditure limitations, stating that the former resulted in 'only a marginal restriction' and 'little direct restraint' on political communication. (424 U.S. at pp. 20-21 [46 L.Ed.2d at pp. 688-689].) However, despite the finding of marginal effect the court invoked strict scrutiny in considering the constitutionality of the contribution limitations. (*Id.* at pp. 23-38 [46 L.2d. 20 at pp. 690-699].) *We likewise give the challenged ordinance stringent review. Id.* at 824. (Emphasis added.)

In attempting to articulate a compelling governmental interest for Berkeley's infringement of protected rights, the court below advanced several interests for Berkeley's action that cannot withstand scrutiny. Citing several law review articles,[6] the California Court concluded that large donations to campaign committees, although "not raising all the same problems as candidate elections, in which large campaign contributions risk creating future 'political debts,' " nevertheless have a corrupting effect upon the electorate. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 826. With no evidence other than commentaries, the California Court found a compelling governmental interest in limiting campaign donations to a committee:

> The finding, all too common in commentaries on the initiative and referendum, that direct legislation is 'enormously expensive to produce and is largely a tool of interest groups,' appears to have inspired measures like the Berkeley ordinance, which attempt a return to the primary goals of the initiative and referendum. (Crouch, et al. Cal. Governmental and Politics (3d Ed. 1964) p. 108.) When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum; instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interests. (Nicholson, *Buckley* v. *Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974,* 1977 Wis.L.Rev. 323, 330). *Id.,* at 827.

Since there was no evidence in the trial court to substantiate its beliefs of "corruption" of the political process by large campaign donations, the court below offered as further support for its position the unsubstantiated views of political com-

---

[6] Diamond, *California's Political Reform Act: Greater Access to the Initiative Process* (1974) 7 Sw. U. L. Rev. 453, 455-463; U. S. F. Comment, p. 164. Note, *The California Initiative Process: A Suggestion for Reform* (1975) 48 So. Cal. L. Rev. 922, 923-924; Comment, *The Constitutionality of Limitations on Corporate Contributions to Ballot Measure Campaigns,* 13 U. S. F. L. Rev. 145 (1978).

mentators,[7] none of whom presented any evidence in the trial court to demonstrate Berkeley's compelling interest in limiting campaign donations:

> Commentators on our political scene have recognized the nexus between voter apathy and large campaign contributions: 'The mass of citizens have tended to shun the opportunity to donate to campaign coffers and to participate in other forms of political activity because they felt their limited resources would be outmatched by a small group of rich and influential 'angels'. . . . [This feeling] has also inspired the emergence of a growing sense of estrangement of disaffection from public institutions and leaders.' (Berg et al. Corruption in the American Political System (1976) 47-50.) The result of this phenomenom is *decidedly* negative: 'By abandoning the field of battle, the average voter leaves the *political* wars to be fought by big contributors and powerful interests.' (*Id.*, at p. 51.) *Citizens Against Rent Control* v. *City of Berkeley, supra* at p. 828.

Yet, nothing in the record of the trial court demonstrated any of the problems alleged by the cited political commentators.[8] The views of the law review and political com-

---

[7] See also Shockley, *The Initiative, Democracy and Money: The Case of Colorado* (1976) Printed in Hearings Before the Subcommittee on the Constitution of Sen. Com. on Judiciary on S. J. Res. 67, 95th Cong., 1st Sess., at pp. 188-189 (1977); Radabaugh, *Tendencies of California Direct Legislation* (1961), *Id.*, at p. 179.

[8] The dissenting opinion in the court below clearly points out that no compelling interest was demonstrated in the trial court:

> What, then, is the compelling interest requiring imposition of a restraint so substantial on two rights so fundmental? The majority identifies it thus: 'large contributions to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures;. . .' My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the compelling interest found by the majority. *It will readily be seen that this wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of 'commentators on our political scene,' 'a political scientist,' or a 'student of the California initiative process.'* (*Citizens Against Rent Control* v. *Berkeley, supra*, at 835, (Richardson J., dissenting, emphasis added.)

mentators cited by the court as justification for the Berkeley ordinance are neither universally shared nor accepted.[9] In the *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), this Court clearly answered the unsubstantiated arguments advanced by the commentators relied on by the California Court below, when Mr. Justice Powell, writing for this Court, rejected the notion that ballot measures, similar to candidates, are likely to be corrupted by large campaign spending:

> *Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections,* e.g., *United States* v. *Automobile Workers, supra; United States* v. *CIO, supra, simply is not present in a popular vote on a public issue.* To be sure, corporate advertising may influence the outcome of the vote; this would be its purposes. But the fact that advocacy may pursuade the electorate is hardly a reason to suppress it. The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S., at 689, 3 L.Ed.2d 1512, 79 S.Ct. 1362. *Id.*, at 790-791. (Emphasis added.)

And, in *Schwartz* v. *Romnes*, 495 F.2d 844 (2nd Cir. 1974), the Court of Appeals for the Second Circuit, in a well reasoned opinion, also rejected the argument that contributing money to a ballot measure has a corrupting effect on the electorate.[10] The court noted that there is a difference between

---

[9] See generally, Note, *The Unconstitutionality of Limitations on Contributions to Political Committees In the 1976 Federal Election Campaign Act*, 86 Yale L.J. 9531 (1977); Ely, *The Supreme Court, 1977 Term*, 92 Harv. L. Rev. 5, 163 (1977); Redish, *Campaign Spending Laws and The First Amendment*, 46 N.Y.U.L. Rev. 900 (1971); Clagett and Bolton, *Buckley* v. *Valeo*, 29 Vand. L. Rev 1327 (1976).

[10] In *Schwartz* v. *Romnes*, *supra*, at 851, the court noted that:

> Corporate funds paid to a candidate or political party have the potential of creating debts that must be paid in the form of special interest legislation or administrative action. *In contrast, when the issue is one to be resolved by the public electorate monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributors' special interest.* Although large private companies have undoubtedly been tempted to "buy" the election of political candidates in the expectation of receiving favors if their candidates should be elected, it is difficult to see how much motivation would play any substantial role in an attempt to influence votes for or

(footnote continued on following page)

donating money to a candidate and making similar donations to a ballot measure.[11] As correctly observed by the court:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is . . . *contributions to a*

(footnote continued from preceding page)

against a referendum. The public remains completely free to reject the views of the corporate contributor, just as it did in the present case, without fear of retribution or non-support by the corporate contributor. The requirement of section 320 that the corporation publicly disclose such expenditures minimizes the risk that the public will be misled as to the source or inspiration of the corporately-financed views. (Emphasis added.)

[11] Other courts have expressed similar views when confronted with the issue of whether there is a compelling governmental interest in limiting campaign expenditures in a ballot measure election. For example, in *Bare* v. *Gordon*, 84 Wash.2d 380, 526 P.2d 379 (1974), the Washington Supreme Court responded:

> Defendants argue as a matter of policy that one of the overriding and, therefore, justifying purposes of the act *is to prevent monied interests from drowning out the voices of the less affluent.* We acknowledge the state's interest in promoting an open, honest, and effective electoral process. We held in *State* v. *Conifer Enterprises, Inc.*, 82 Wash.2d 94, 508 P.2d 149 (1973), that such a goal was sufficient to meet the stringent, compelling interest test. However, it is far from certain that section 14 serves to accomplish the desired goal. For example, the affluent could spend the maximum amount allowable under section 14 in one concentrated campaign promotion, thereby precluding further effective political communication on the same side of the issue, affecting rich and poor alike. Conceivably, then, the power of money is decreased, not diminished, by section 14. *Id.*, 526 P.2d at 383. (Emphasis added.)

See also *Deras* v. *Myers*, 535 P.2d 541 (Ore. 1975) where the Oregon Supreme Court asserted:

> . . . *There is no evidence in this case, not any data in the studies on campaign expenditures discovered in our research, which would lead to the conclusion that our system of government is imperiled by the free expenditure of funds in political campaigns.* Conceding for the purposes of this case that limitation and control of campaign expenditures is of great importance in the catalogue of our social and political needs, the good it proposes to accomplish must be weighed against the danger which it generates in restraining our citizens from freely expressing their view. In weighing these competing interests, one must recognize the importance of the electorate's liberties of expression of opinion and assembly in the overall system of government established by our state and federal constitutions. These rights have been termed the 'cornerstone of democracy' and so important as to require 'breathing space' and protection even from the 'chilling effect' of overbroad and ambiguous statutory restrictions. *Id.*, at 545. (Emphasis added.)

public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights. Against a background on such attenuated danger, we decline here, as we did in *United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1142 (1972), to ascribe to the legislator an intention to regulate, perchance prohibit, the expression of opinion on fundamental issues of the day. *Id.*, at 852-853. (Emphasis added.)

2. The Governmental Interest Allegedly Served By The Berkeley Ordinance Is Illusory.

According to the court below, the "Berkeley ordinance . . . seeks to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring voters that their participation, whether in the form of money or services, are significant. We conclude that the interest served by the ordinance should be recognized as compelling." *Citizens Against Rent Control* v. *City of Berkeley, supra*, at 829.

Supposedly, the donation limitation of the Berkeley ordinance will restore confidence in the political process and will assure voters that their votes and participation are significant. In accomplishing this asserted interest, Berkeley, on the one hand, contends that a person is still free to spend an unlimited amount of money in a ballot measure election so long as it is not donated to a committee. On the other hand, the city asserts that if that same person decides to contribute the same amount he would have spent individually to a committee, that donation would then have a corrupting effect on the electorate and would make voters feel that their participation is insignificant.

The underlying assumption of this position is that if a limit is placed upon the amount of money a committee can receive, less money will be spent in an election and the potential for corruption is therefore less.[12] However, if there can be no limit

---

[12] Restrictions on the size of contributions to a campaign committee, when examined rationally, have no impact on a ballot measure insofar as corruption is concerned:

Appellants also contend that the restrictions upon the size of contributions to a single committee are necessary to promote adequate disclosure about

(footnote continued on following page)

placed upon the right of an individual to spend money in a ballot measure election, it does not make sense to limit the amount that same person can donate to a committee. To do so would be to accomplish an illusory goal.

For example, if a person expends $20,000 individually in a local election this would not violate the law and would, under the theory of the Berkeley ordinance, not have a corrupting effect upon the electorate. But, if 50 persons donated $300 each to a committee and this represented the total expenditure of the committee, the Berkeley ordinance would prohibit these 50 persons from pooling their resource to expend $15,000 while allowing the person who spent the $20,000 to do so with impunity. How is the electorate harmed more from the $15,000 expenditure by the committee than it is by the $20,000 by the individual?

It is irrational to assume that merely because people may pool their resources into a committee and expend their collective funds either in support of or in opposition to a ballot measure this will have a corrupting effect on the electorate.[13]

(footnote continued from preceding page)

who is financing a campaign. In the absence of these restrictions, appellants contend that corporations and wealthy individuals would mask their participation in a referendum campaign by funneling large sums of money into a committee which the public would see only under an innocuous title such as 'Let's Help Florida' or 'Dade Voters for a Free Choice.' Although promoting disclosure of campaign contributors is an important state interest, the restrictions upon political contributions in section 106.08(1)(d)(e) cannot be justified as disclosure measures because the statutes are not closely drawn to avoid unnecessary abridgment of associational freedoms. *These statutes that restrict the amount a person may contribute to a single committee do little to promote disclosure.* The primary effect of the statutes is to compel large contributors who support or oppose a referendum issue to form multiple partisan committees, each of which can receive the maximum amount from a single contributor under the statute. These multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors. *Let's Help Florida* v. *McCrary*, 621 F.2d 195, 200 (5th Cir. 1980). (Emphasis added.)

[13] There is no demonstrated need for Berkeley to limit the ability of a committee to disseminate its views. Limiting the amount of money that may be donated to a committee serves only to curtail the protected speech of a committee. Government, in the absence of a compelling interest, is without power to silence a committee. In *Cohen* v. *California*, 403 U.S. 15 (1971), this Court pointed out:

(footnote continued on following page)

The electorate would be no more harmed by the expenditure of $15,000 by a committee than it would be by the expenditure of $20,000 by a single person. As a matter of fact, the voter would be exposed to more information, in this instance, than if a committee had spent the money to disseminate information.

In the final analysis, it is illusory to set up such a scheme allegedly to protect the voters from corruption.[14] In each instance, whether the money is spent by a person or by a committee, it is spent to disseminate information regarding the ballot measure. Whether the information received by the voter comes as a result of being paid for by a committee, rather than an individual, has no demonstrable effect on the voter and cannot possibly harm him. Unlike candidates, ballot measures, as inanimate objects, do not lend themselves to the possibility of the *quid pro quo* corruption between a contributor and a candidate[15] as explained by the Court in *Buckley* v. *Valeo, supra,* at 26-29.

(footnote continued from preceding page)

> While this court has recognized that government may properly act in many situations to prohibit intrusions into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the dialogue [citation omitted], we have at the same time consistently stressed that "we are often 'captive' . . . and subject to objectional speech" [citation omitted]. *The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.* Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. *Cohen* v. *California, supra,* at 21, (emphasis added.)

[14] A similar protective scheme was rejected in *First National Bank of Boston* v. *Bellotti supra,* at 790, n. 29.

> Appellee contends that the State's interest in sustaining the active role of the individual citizen is especially great with respect to referenda because they involve the direct participation of the people in the lawmaking process. But far from inviting greater restriction of speech, the direct participation of the people in a referendum, if anything, increases the need for 'the widest possible dissemination of information from diverse and antagonistic sources. (Citations omitted.)'

[15] Justice Richardson, in his dissent in the court below, aptly explained the untenability of the majority's unwarranted conclusion that allowing unlimited donations to a campaign committee will threaten the political process:

> The majority's conclusion that there is such a "threat" to our electoral system thereby "potentially" inhibiting the initiative process may or may not be correct. *There is no record before us and in this*

(footnote continued on following page)

In *Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980) the court, citing *First National Bank of Boston* v. *Bellotti*, *supra*, explained how a state's interest is not advanced by attempting to limit spending in an election concerning a ballot measure:

> The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. *In contrast when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers*—in this case, the voters themselves—except in a manner protected by the first amendment. *Let's Help Florida* v. *McCrary*, *supra*, at 199-200. (Emphasis added.)

Thus, when section 602 is analyzed rationally, in view of the governmental interest it allegedly seeks to advance, it becomes clear that the purported interest is illusory.

(footnote continued from preceding page)

connection the procedural posture of the case should be noted. The trial court granted summary judgment in favor of the citizens' committee which attacked the ordinance. Assuming, only for purposes of analysis, that the trial court was improvident in the entry of its summary judgment invalidating the ordinance, it is manifestly unfair for the majority on the other hand to sustain the ordinance without affording the citizens' committee an opportunity to challenge or rebut the opinions and views of the 'commentator,' 'political scientist,' and 'student' on which the majority wholly relies. *The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is "largely a tool of interest groups" would make interesting background material for a political debate. Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and compelling interest in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented.* Indeed the only empirical data that appear in the record are studies of spending on statewide initiative campaigns in California during the period 1954-1974. The studies conducted by a Sacramento research organization, reveal that in 28 statewide contests the highest spenders won 14 times and lost 14 times. I must leave to the reader what the arithmetic proves. *Citizens Against Rent Control* v. *City of Berkeley*, *supra*, at 835-836, (Richardson, J. dissenting, emphasis added.)

II

THE FIRST AMENDMENT PROHIBITS GOVERNMENT FROM LIMITING THE SPEECH OF SOME IN ORDER TO ENHANCE THE VOICES OF OTHERS.

The obvious intent of the Berkeley ordinance is to limit the ability of a committee to disseminate its view because others may not have equal means of disseminating their views.[16] Even though this "noble" governmental purpose may appear reasonable, it collides head-on with the First Amendment. Restricting the speech of those who have the means, financially or otherwise, of expressing their ideas so as not to place persons with less effective means of communicating their views at a disadvantage, has been expressly rejected by this Court. *Buckley* v. *Valeo, supra,* at 48-49.

Moreover, not only has the concept of equalizing the voices of others been rejected, but also the idea of limiting the advocacy of those with means of communicating, because others do not have equal means of advocacy, has been rejected. *Buckley* v. *Valeo, supra,* at 48-49. This Court made it clear in *Buckley* that government cannot limit the speech of some in order to enchance the relative voices of others:

> *But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment,*

---

[16] According to the court below:

> In *Buckley* the court recognized the potential for corruption of the electoral process in a regime of large contributions in candidate elections. (424 U.S. at pp. 26-27 [46 L.Ed.2d at p. 692].) Here, it is argued that the electoral process is similarly corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference. In another context we recognized the danger of such a loss of confidence: 'One disturbing phenomenon of the current political scene of which we may take judicial notice is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern, and lack of participation, if prolonged, may pose a danger to the democratic institutions, far more subtle and invidious than any other. *Johnson* v. *Hamilton* (1975) 15 Cal.3d 461, 471 [125 Cal.Rptr. 129, 541 P.2d 881]'. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 827.

which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources," ' and ' "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." ' *New York Times Co.* v. *Sullivan, supra,* at 266, 269, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 ALR2d 1412, quoting *Associated Press* v. *United States,* 326 U.S. 1, 20, 89 L.2d. 2013, 65 S.Ct. 1416 (1945) and *Roth* v. *United States,* 354 U.S., at 484, 1 L.Ed.2d 1498, 77 S.Ct. 1304, 14 Ohio Ops.2d 331. *The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.* Cf. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 139, 5 L.Ed.2d 464, 81 S.Ct. 523 (1961). *Buckley* v. *Valeo, supra,* at 48-49. (Emphasis added.)

The decision of the California Court is pregnant with suggestions that large money interests must be curtailed in ballot elections in order to restore confidence in the electoral process.[17] *Citizens Against Rent Control* v. *City of Berkeley, supra,* at pp. 825-831. Accordingly, the court erroneously held

---

[17] For example, the California Court intimates that there is usually something sinister about unlimited expenditures by individuals and corporations:

> It could be contended that unlimited expenditures by individuals and corporations can be as sinister as unlimited contributions to committees, and that the activities of committees can be as essential to the political process as those of individuals and corporations. While as a broad proposition that viewpoint may be arguable, it is a value judgment. On such matters, we yield to the legislative determination.
>
> The contrary legislative determination here is not without a tenable rationale. Campaign committees are generally shrouded in anonymity, often adopting seductive names promising to save taxes, preserve resources, or prevent crime. While committees must ultimately identify their donors, the campaign propaganda and the identification are not simultaneous; inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed. On the other hand, when political views are expressed directly by individuals or covertly through committees, the voters are immediately made aware of the interested parties and can evaluate their motivation. *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 831.

For a rebuttal to this argument that the Berkeley ordinance reduces the possibility of anonymity, see *Let's Help Florida* v. *McCrary, supra,* at 780 cited heretofore in footnote 12.

that Berkeley may enhance the voices of some of its citizens by abridging the right of others to make campaign donations in excess of $250 to a campaign committee. This notion was disapproved by the *Buckley* Court:

> Neither the voting rights cases nor the Court's upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.
>
> Cases invalidating governmentally imposed wealth restrictions . . . rest on the conclusion that wealth 'is not germane to one's ability to participate intelligently in the electoral process' and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. [Citations omitted.] ***But the principles that underlie invalidation of governmentally imposed restriction on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-intentioned electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.*** *Buckley* v. *Valeo, supra,* at 49, n. 55. (Emphasis added.)

When the underlying rationale of section 602 is examined, it becomes evident that the section assumes unnecessarily that monied interests will combine their resources and outspend their opponents. To help ensure that this does not happen, the ordinance places a $250 limitation on donations that may be made to a campaign committee. By the $250 limit, the section is designed to equalize spending on both sides of the initiative. Yet, at the same time, any one of the monied interests could, if it desired, spend an unlimited amount of money—far in excess of the money spent by any campaign committee—to oppose or support the ballot measure. What then is the interest served by trying to equalize spending by campaign committees?

That interest, at most, is the kind of paternalism that has been previously rejected by this Court. For example, in *First National Bank of Boston* v. *Bellotti, supra,* at 791, n.31, this

Court said that "Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves." So, if a person can spend individually as much as, or more than, a committee, the paternalistic approach of the statute does not achieve its goals of equalizing the competing voices in a ballot election.[18] There is simply no room, consistent with the First Amendment, for this attempt at equalizing competing voices in a ballot measure election.

III

BERKELEY'S ORDINANCE LIMITING THE AMOUNT THAT MAY BE CONTRIBUTED TO A CAMPAIGN COMMITTEE PLACES AN IMPERMISSIBLE RESTRAINT UPON THE RIGHT OF VOTERS TO RECEIVE INFORMATION FROM ALL SOURCES.

Implicit, if not explicit, in the First Amendment is the right of the public to know. To be knowledgeable the public must be free to receive information on all subjects and from all sources. As Professor Lawrence Tribe has observed: "A right to speak may be said to exist when the Court will not allow government to justify a restriction on expressive conduct by a claim that the ideas or information expressed are dangerous; that the speaker may exercise liberty of expression in some places, time, or manner; *or that the speaker should be muffled in order that a diversity of viewpoints might be heard in the market place of ideas.*" Tribe, *American Constitutional Law* (1978) at p. 675. (Emphasis added.)

---

[18] The *Bellotti* Court rejected a similar paternalistic approach:

> The State's paternalism evidenced by this statute is illustrated by the fact that Massachusetts does not prohibit lobbying by corporations, which are free to exert as much influence on the people's representatives as their resources and inclinations permit. Presumably the legislature thought its members competent to resist the pressures and blandishments of lobbying, but had markedly less confidence in the electorate. If the First Amendment protects the right of corporations to petition legislative and administrative bodies, see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-511, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972); *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138, 5 L.Ed.2d 464, 81 S.Ct. 523 (1961), there hardly can be less reason for allowing corporate views to be presented openly to the people when they are to take action in their sovereign capacity. *First National Bank of Boston* v. *Bellotti, supra*, at 791, N.31.

Unfortunately, the California Court ruled that campaign donations to committee should be "muffled in order that a diversity of viewpoints might be heard."[19] But the First Amendment protects the public's right to acquire desired information or ideas free of governmental veto or interference.[20]

The voters need to be aware of all viewpoints in an election because free "access to discussion, debate and the dissemination of information and ideas" (*First National Bank of Boston* v. *Bellotti, supra,* at 783), is fundamental to the basic premise of democracy. That basic premise is that people are presumed to have a certain amount of intelligence, and that they should be able, without governmental interference, to evaluate materials and make their own decisions about their worth:[21]

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. *They may consider in making their judgment the source and creditability of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is*

---

[19] In the decision below, the court surmised that: "When large contributors use the power of their purse to overcome the power of reason, they thwart the intended purpose of the initiative or referendum: instead of fostering participation by a greater segment of the electorate, the vision of direct democracy is transformed into a tool of narrow interest." *Citizens Against Rent Control* v. *City of Berkeley, supra,* at 827.

[20] See, e.g., *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (reversing a conviction for teaching German in violation of a state law prohibiting the teaching of foreign language to young children, in part because the law interfered "with the opportunities of pupils to acquire knowledge"); *Stanley* v. *Georgia,* 394 U.S. 557 (1969) (reversing a conviction for possession of pornographic material in defendant's home; such application of the statute held to interfere with the possessor's rights to know and to be free of unwarranted intrusions into privacy).

[21] This point has been aptly stated by one commentator:

> The Court [in Bellotti] properly deemed it safe to entrust the marketplace of ideas to private and diverse individuals and groups than to allow state controls over speakers and messages. The Court's approach is consistent with recent decisions invalidating paternalistic state restrictions on commercial speech. The public can be trusted to evaluate political and commercial messages in light of their sources before making political and consumer decisions. Ely, *supra,* 92 Harv. L. Rev. at pp. 168-169.

a danger contemplated by the framers of the First Amendment. First National Bank of Boston v. *Bellotti, supra,* at pp. 791-792. (Emphasis added.)

Furthermore, in *First National Bank of Boston* v. *Bellotti, supra,* the Court specifically rejected the paternalistic approach adopted by the California Court below, when it observed that: "The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what people may hear." *Id.* at p. 791, n.31.

Regardless of Berkeley's alleged interest in restoring confidence in the political system (assuming such has in fact been lost) it cannot restore that confidence by allowing unlimited expenditures on the part of individuals on the one hand, and on the other hand restricting the ability of a committee to freely participate in the electoral process.[22] Government cannot, consistent with the First Amendment, limit the voters' access to the information available for dissemination by committees. Restricting the amount of money a committee may have at its disposal in an election limits the committee's ability to communicate its views and therefore limits the ability of the voters to receive such information.[23]

To communicate ideas and viewpoints in an election is costly. Without sufficient funds, the reality of life is that views cannot be communicated and voters are deprived of information. To the extent a limit is placed upon contributions to a committee, that limitation reduces the quantity of information

---

[22] "The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual." *First National Bank of Boston* v. *Bellotti, supra,* at p. 777. Moreover, continued the Court: "Freedom of expression has particular significance with respect to government because '[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.' T. Emerson, Toward a General Theory of the First Amendment 9 (1966). See also A. Meiklejohn, Free Speech and Its Relation to Self-Government 24-26 (1948)." *Id.*, at p. 777, n.11.

[23] By prohibiting a committee from receiving a contribution of more than $250 from any one source curtails the committee's right to engage in political expression. According to the Court in *Buckley* v. *Valeo, supra:* "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.*, at p. 19, n. 18.

available. In *Buckley* v. *Valeo, supra,* where an attempt was made to limit campaign expenditures, the Court warned that:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quality of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. *This is because virtually every means of communicating ideas in today's mass society require the expenditure of money.* The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. *The electorate's increasing dependence on television, radio, and other media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. Id.,* at p. 19.

IV

SECTION 602 OF THE ORDINANCE DENIES EQUAL PROTECTION OF THE LAW TO THOSE WHO POOL THEIR RESOURCES TO COMMUNICATE THEIR POLITICAL VIEWS.

Legislative classifications which infringe fundamental rights, such as participating in the electoral process, are strictly scrutinized and are held to be violative of the Equal Protection Clause unless a compelling governmental interest can be shown. See *Tribe, supra,* at p. 1002. Those who seek to pool their resources by making campaign contributions to a committee are entitled to equal protection of the law. When a statute treats persons differently with respect to the exercise of fundamental constitutional rights, the statute violates the Equal Protection Clause unless the difference in treatment can be justified by a compelling state interest. See *Reynolds* v. *Simms,* 377 U.S. 533, 562 (1964); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963); *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942); see also *Developments in the Law—Equal Protection* (1962) 82 Harv. L.Rev. 1064, 1120-1131.

Under the strict standard of review applied in these cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the differences imposed by the law are necessary to further that purpose.[24] See *Hall* v. *Beals*, 396 U.S. 45, 52 (1969) (Justice Marshall, dissenting).

Section 602 of the Berkeley ordinance clearly draws a distinction between those who donate to a committee and those who make direct expenditures toward a ballot measure. A person, under the ordinance, may expend any amount desired either for or against a ballot measure. But if a group of people pool their money together, by forming a committee, section 602 limits each contributor to $250.

The court below concluded that this distinction served a compelling governmental interest in that it "seeks to reverse the trend toward loss of confidence in our political system and apathy in elections by assuring the voters that their vote and their participation, whether in the form of money or services, are significant." *Id.*, at 829. In explaining its reason for limiting the amount a person may contribute to a committee, the California Court stated:

> [T]he Berkeley ordinance places no limit on expenditures, and permits contributions from any source in amounts up to $250. Thus, an individual or business entity that believes its interests are benefited or threatened by a proposed ballot measure remains free to spend money in unlimited amounts, by mass advertising or any other method, to inform the public of its reasons why the measure should be defeated. ***However, in order to maintain the initiative and referendum processes as a tool of direct democracy for the people, individuals of business entities are prohibited from contributing more than a modest sum to a measure.*** *Id.*, at 829. (Emphasis added.)

---

[24] When reviewing statues which touch upon "fundamental interest," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny [where] . . . the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." *Johnson* v. *Hamilton*, 15 Cal.3d 461, 466 (1975); see also, *Weber* v. *City Council*, 9 Cal.3d 950, 958-959 (1973); *Thompson* v. *Mellon*, 9 Cal.3d 96, 99, n.2 (1973).

On its face, the court's rationale cannot withstand scrutiny. If the evil sought to be eliminated, as the court suggests, is to prevent "loss of confidence in our political system . . . by assuring the voters that their votes and their participation . . . are significant" (*Id.*, at 829), then the $250 limitation on the amount that may be donated to a committee does not serve that end. By limiting to $250 the amount a person can donate to a committee while on the other hand allowing that same person to spend any amount desired either for or against a ballot measure, does not further the purpose of the ordinance nor does it serve a compelling governmental interest.

As the Court pointed out in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), when a fundamental right (expressing views in the electoral process is such a right) is infringed, a compelling governmental interest, not just a rational relationship, must be shown. In *Shapiro*, which dealt with welfare benefits and the fundamental right to travel, the Court observed:

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.* Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). *Id.*, at 634. (Emphasis added.)

If people can spend unlimited amounts of money individually on local ballot elections, there is certainly no compelling governmental interest served in limiting donations to a committee which may spend that same amount of money. Unless it

can be shown that the committee process itself has a corrupting influence on the electoral process, a difference, without even a rational basis, is clearly established. The underlying premise of the Berkeley ordinance is a false premise. It presumes that a committee's expenditure of money, merely because it may come from many sources, will necessarily be greater than that of an individual's and will therefore purchase too much speech and thereby corrupt the electorate. There is no support for this unwarranted assumption.[25]

Whether a committee spends money in a ballot election or whether an individual spends an equal amount as spent by the committee or less cannot be the determinant for infringement of a fundamental right. There is an "equality of status" of ideas in the marketplace whether expressed by individuals or by committees. For example, in *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972) the Court made it clear that:

> There is an 'equality of status in the field of ideas,' and government must afford all points of views an equal opportunity to be heard. . . .
>
> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. *Id.*, at 96.

Not only is there no compelling governmental interest in treating committees differently from persons, such a distinction is not even rationally related to the city's alleged objective. Therefore, it violates the Equal Protection Clause.

---

[25] In answering the majority's presumption of corruption, the dissent correctly observed:

> Moreover, the majority does not attempt to answer Justice Rouse's perceptive analysis of the meaning of 'corruption' within the initiative context: '*The term 'corrupt' implies the existence of expectation of a political quid pro quo. In addition, the term 'corruption' subtly conveys the impression that there is a deviation from an objective standard. Such a belief can have no validity. In a democratic system, objective 'truth' is that which the majority subjectively chooses to adopt.* Hence it is delusive to maintain that a declaration by the electorate can be 'corrupt'. The price of free speech is that we must put up with opinions which we may deem to be the purest humbug, untainted by any trace of truth. . . . *(N.A.A.C.P.* v. *Button* [1963] 371 U.S. 415, 445.)' *Citizens Against Rent Control* v. *City of Berkeley, supra*, at 837-838 (Richardson, J. dissenting, emphasis added.)

V

CONCLUSION

Amicus Curiae respectfully urges this Court to reaffirm the fundamental principle that free speech means that government cannot limit the speech of committees in order to enhance the relative voices of others. The First Amendment mandates that there be an uninhibited flow of information and ideas from all sources in a ballot measure election without governmental limitations upon the amount a person may donate to a committee to either support or oppose such a measure. Therefore, Amicus Curiae respectfully submits that the judgment of the California Supreme Court should be reversed.

Dated: April 23, 1981.

Respectfully submitted,

MALCOLM H. FURBUSH
ROBERT OHLBACH
JOHN B. GIBSON
JOSEPH I. KELLY
ROBERT L. HARRIS
PATRICK G. GOLDEN

By ROBERT L. HARRIS
ROBERT L. HARRIS

Counsel for Amicus Curiae

Pacific Gas and Electric Company
77 Beale Street
P.O. Box 7442
San Francisco, California 94106
(415) 781-4211

Office-Supreme Court, U.S.
FILED
MAY 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL, *et al.*,
Appellants,

vs.

CITY OF BERKELEY, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF IN SUPPORT OF APPELLEES BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

ELIZABETH M. KATZ
Legal Assistant
206 City Hall
San Francisco, CA 94102
Telephone (415) 558-3559

TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 4
ARGUMENT 4
A. BASIC PRINCIPLES 4
B. THIS COURT HAS UPHELD THE CONSTITUTIONALITY OF CONTRIBUTION LIMITATIONS IN CANDIDATE CAMPAIGNS 6
C. THE "LEADING CASES" PROVIDE LITTLE ASSISTANCE TO THIS COURT 7
D. THE MEANING OF CORRUPTION 15
E. THE POTENTIAL FOR CORRUPTION IN BALLOT MEASURE CAMPAIGNS 16
F. THE APPEARANCE AND REALITY OF CORRUPTION IN BALLOT MEASURE CAMPAIGNS 18
G. THE COMPELLING INTERESTS OF THE STATE IN REGULATING BALLOT MEASURE CAMPAIGNS 27
H. CONTRIBUTION LIMITATIONS TO POLITICAL COMMITTEES SERVE THESE INTERESTS WITHOUT BROAD INFRINGEMENT ON BASIC POLITICAL FREEDOMS 28
CONCLUSION 30

TABLE OF AUTHORITIES CITED

CASES — PAGE

Brown v. *Superior Court*, 5 Cal.3d 509, 96 Cal.Rptr. 584, 487 P.2d 1224 (1971) 18
Buckley v. *Valeo*, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) 5, 6-7, 11, 14, 28, 29, 30
C. & C. Plywood Corp. v. *Hanson*, 20 F.Supp. 1254 (D. Mont. 1976) 7-8, 11-12, 14
C. & C. Plywood Corp. v. *Hanson*, 583 F.2d 421 (9th Cir. 1978) 8, 13, 14
Citizens for Jobs and Energy v. *Fair Political Practices Commission*, 16 Cal.3d 671, 129 Cal.Rptr. 106, 547 P.2d 1386 (1976) 11
Committee for Sewer Referendum v. *Humboldt Bay Wastewater Authority*, 77 Cal.App.3d 117, 143 Cal.Rptr. 463 (1978) 20
Commonwealth v. *McCarthy*, 281 Mass. 253, 183 N.E. 495 (1932) 10, 17, 18
First National Bank of Boston v. *Bellotti*, 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978) 5, 7, 12-13, 14, 27, 29
Frias v. *Board of Trustees of Ector County*, 584 S.W.2d 944 (Tex. Civ. App. 1979) 8, 13, 14
Let's Help Florida v. *Smathers*, 453 F.Supp. 1003 (N. D. Fla. 1978) 8, 13, 14
Let's Help Florida v. *McCrary*, 621 F.2d 195 (5th Cir. 1980) 8, 13-14
Pacific Gas & Electric Company v. *City of Berkeley*, 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976) 7, 10-11, 12, 14
People v. *Gansley*, 191 Mich. 357, 158 N.W. 195 (1916) ..10, 16-17
Schmitz v. *Younger*, 21 Cal.3d 90, 145 Cal. Rptr. 517, 577 P.2d 652 (1978) 20
Schwartz v. *Romnes*, 495 F.2d 844 (2d Cir. 1974) .....7, 9-10, 11, ... 13, 14, 18
State ex rel. Corrigan v. *Cleveland-Cliffs Iron Co.*, 169 Ohio St. 42, 157 N.E. 2d 331 (1959) 10
State ex rel. Nybo v. *District Court of First Judicial District*, 158 Mont. 429, 492 P.2d 1395 (1972) 10, 11
United States v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) 7, 8, 10, 14

CONSTITUTIONS

California Constitution, Article 1, Section 2 3
California Constitution, Article 2, Section 10(c) 20
United States Constitution, First Amendment .2, 3, 4, 5, 6, 7, 12, 30
United States Constitution, Fourteenth Amendment..... 30

STATUTES

Federal Election Campaign Act of 1971 ..... 8, 14
San Francisco Administrative Code, Part II, Article XII, Sections 16.501, 16.503(f), 16.508(b)(1) 1, 2
San Francisco Municipal Election Campaign Control Act, Ordinance 261-73, amended by Ordinances 447-73, 114-76, 292-76 and 165-77 1

OTHER AUTHORITIES — PAGE

BERG, HAHN, SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM (1976) 15
Bourne, Jr., *Initiative, Referendum, and Recall,* 109 ATLANTIC MONTHLY 122 (1912) 19
California Legislature, Assembly Committee on Elections and Reapportionment, Public Hearing on the Initiative Process (1972) 18
California Legislature, Assembly Interim Committee on Constitutional Amendments, Public Hearing on the Initiative Process (1965) 18
Cottrell, *Twenty-Five Years of Direct Legislation in California* 3 PUB. OP. Q. 30 (1939) 18
Comment, *The Constitutionality of Limitations on Individual Campaign Contributions and Expenditures: The Supreme Court's Decision in Buckley* v. *Valeo* 25 EMORY L.J. 400 (1976) 4
Diamond, et al, *California's Political Reform Act: Greater Access to the Initiative Process,* 7 S.W.U.L.REV. 453 (1975) 18, 19, 20
Endicott, *A Fixture in California—More Than 140 Proposals Since 1912,* L.A. Times, October 22, 1972, §F at page 5 18
Haynes, Direct Government in California, Sen. Doc. 738, 64th Cong., 2d Sess., 1917 20
KEY and CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (1939) 18
Lee, *California,* in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (Butler and Ranney, eds., 1978) 18
Lee, *The Initiative and Referendum: How California Has Fared,* 68 NAT'L CIV. REV. 69 (1979) 18
Lydenberg, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS (1979) 21
Lydenberg, BANKROLLING BALLOTS: 1980 UPDATE (New York: Council on Economic Priorities, July, 1981) 22, 23, 24, 25
Mathews, *The Ballot Initiative: Whom Does it Serve?,* L.A. Times, October 22, 1972, §F at 4 ..... 18, 19
Notes, *The California Initiative Process: A Suggestion for Reform,* 48 S.CAL.L.REV. 922 (1975) 18, 25
Radabaugh, *Tendencies of California Direct Legislation,* 42 S.W. SOC. SCI. Q. 66 (1961) 18
Radin, *Popular Legislation in California,* 23 MINN. L. REV. 559 (1939) 18
Radin, *Popular Legislation in California: 1936-1946,* 5 CAL. L. REV. 171 (1947) 18
Richman, *Election Law,* 1979 ANN. SUR. AM. L. 285 18
Rosenthal, *Campaign Financing and the Constitution,* 9 HAR. J. LEGIS. 359 (1972) 4

OTHER AUTHORITIES — PAGE

Roosevelt, *National and Popular Rule*, 97 OUTLOOK 96 (1911) . 19
SABATO, RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS (Random, Basic Books, September, 1981) 25
Shepard, *Participation in Local Policy-Making: The Case of Referenda*, 56 SOC. SCI. Q. 55 (1975) 25
U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Hearings on the Voter Initiative Constitutional Amendment (1978) 25-27
WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d. ed.) 15

No. 80-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL, *et al.*,
Appellants,

VS.

CITY OF BERKELEY, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF IN SUPPORT OF APPELLEES BY AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO

STATEMENT OF INTEREST

In 1973, San Francisco adopted a legislative scheme designed to protect the democratic process of direct legislation from corruption. The Municipal Election Campaign Control Act (Ordinance 261-73, amended by Ordinances 447-73, 114-76, 292-76 and 165-77) appears in the San Francisco Administrative Code as Article XII, Section 16.501 *et seq.* A key portion of that scheme is Section 16.508(b)(1), which imposes a $500

limit on individual and organizational contributions to a committee formed for the purpose of influencing citizens to vote in support of or in opposition to a municipal ballot measure.[1]

The November 7, 1978, general election in San Francisco included a municipal ballot measure which proposed a renters' rebate. On September 15, 1978, an organization opposing the measure, the "Committee for the Preservation of Quality Housing" (hereinafter, the "Committee") filed a complaint in Superior Court in and for the City and County of San Francisco (No. 743-366) seeking, among other things, to enjoin enforcement of Section 16.508(b)(1), *supra.* The Committee alleged that San Francisco's contribution limitation impermissibly violated freedoms of speech and association as guaranteed by the United States and California Constitutions. San Francisco defended its contribution limitation on the basis that it was a narrowly drawn restriction on First Amendment freedoms, necessary to preserve the integrity of the electoral process and the confidence of its citizens in their government. The trial court denied the Committee's application for a preliminary injunction. The Committee then sought a temporary restraining order and writ of mandate in the California Court of Appeal to compel the Superior Court to grant the preliminary injunction. The writ was denied (1 Civ. 45222). In the interim, the rebate measure was defeated, and the Committee did not further litigate the validity of San Francisco's contribution limitations.

In the instant case, on the other hand, the City of Berkeley submitted almost no evidence at the hearing in Superior Court to justify its contribution limitation. Berkeley did not prevail. Accordingly, San Francisco submitted an *amicus curiae* brief to the Court of Appeal, arguing that any decision of the court should fully recognize this absence of evidence and that the court's articulation of constitutional principles as they apply to contribution limitations in ballot measure campaigns should be carefully written so as to be confined to the record before the court.

---

[1] Section 16.508(b)(1) provides, "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or opposition to any measure requiring a simple majority vote for its adoption to exceed five hundred dollars ($500)." Section 16.503(f) of the San Francisco Ordinance provides, " 'Person' shall mean any individual, partnership, corporation, association, firm, committee, club or other organization or group of persons, however organized."

San Francisco also directed the attention of the Court of Appeal to a serious flaw in the analyses of some courts, including federal courts, sister courts and California courts, which have been called on to review the legality of various attempts to regulate ballot measure campaigns. San Francisco's primary purpose in addressing its brief to the Court of Appeal was to foster a full understanding of the political process in a democratic society—particularly the process of direct legislation—as well as a recognition and appreciation of the corrupting influences that uncontrolled contributions of money can have on that process.

Finally, San Francisco sought to demonstrate to the Court of Appeal the types of evidence which might be propounded in defense of a contribution limitation in ballot measure campaigns. It sought not to supplement the record before the Court of Appeal, but to emphasize to the court that its decision in this case should not prevent other local governments in the State of California from successfully defending their contribution limitation ordinances.

Despite the efforts of San Francisco to obtain a narrow decision limited to the record in this case, the decision of the Court of Appeal posed exactly the threat which San Francisco had feared.

Accordingly, San Francisco submitted an *amicus curiae* brief to the Supreme Court of California for the same reasons it had addressed the Court of Appeal in this case. Correctly applying the strict scrutiny test, that court recognized the compelling governmental interests served by Berkeley's contribution limitation, noted the limited effect of the ordinance on freedoms of speech and association and concluded that the ordinance promotes compelling governmental interests by the least restrictive means possible. The ordinance was thus held valid both as to the First Amendment of the United States Constitution and as to Article I, Section 2 of the California Constitution.

San Francisco's interest in this litigation continues. The lack of evidence in the Superior Court record herein must be weighed against the evidence which might be propounded in defense of a contribution limitation in ballot measure campaigns by other governmental entities, and the decision of this court must be carefully written so as to allow other governmental entities to establish the validity of their ordinances. Such exercises will be futile, however, if this court does not

affirm the full analysis of the problem finally accorded by the California Supreme Court in contrast to the other courts' ready dismissal of ballot measure campaigns as beyond corruption.

SUMMARY OF ARGUMENT

Regulation of the electoral process necessarily affects First Amendment guarantees of freedom of speech and association. Such regulation must therefore meet a strict scrutiny test, whereby government must prove that the regulation serves compelling interests by the least restrictive means possible.

The constitutional validity of contribution limitations in ballot measure campaigns is a question of first impression for this court. Previous cases in this and other courts which have dealt with related questions must be carefully distinguished. Previous decisions in other courts which have dealt with this question must be examined closely both in terms of evidence and logical analysis.

Corruption of the electoral process is not limited to the quid pro quo of large contributions to candidates, creating a political debt. Direct, as well as representative, democracy is susceptible to corruption and the appearance of corruption. Not only is direct democracy susceptible, it has succumbed, and the effects—alienation from the electoral process as a whole, disbelief in the legitimacy of the government and its laws—are the compelling concerns which governments seek to address by regulation. Contribution limitations in ballot measure campaigns serve compelling government interests without unduly restricting freedoms of speech and association.

ARGUMENT

A. Basic Principles

Democratic government's claim to legitimacy rests in large part on the widely held conviction that a democracy is, in the immortal words of President Abraham Lincoln, "of the people, by the people, and for the people." Thus, the electoral process lies at the very heart of democratic government.[2] The right of government to protect the integrity of the electoral process through regulation is well established.[3] Such regulation how-

---

[2] Rosenthal, *Campaign Financing and the Constitution*, 9 HAR. J. LEGIS. 359 (1972).

[3] Comment, *The Constitutionality of Limitations on Individual Campaign Contributions and Expenditures: The Supreme Court's Decision in Buckley v. Valeo* 25 EMORY L. J. 400 (1976).

ever, operates in the area of the activities protected by the First Amendment guarantees of freedom of speech and association. This court in *Buckley* v. *Valeo* 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976) recognized the dilemma. The court noted, at 424 U.S. 14-15:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protections to such political expression in order to 'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' [Citations omitted.]
>
> * * *
>
> The First Amendment protects political association as well as political expression. The Constitutional right of association explicated in *N.A.A.C.P.* v. *Alabama* [citation omitted] stemmed from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.'

However, the court also noted, at 25, that the First Amendment does not afford such activities absolute protection:

> *Even a 'significant interference' with protected rights . . . may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgements of [these] freedoms.* [Citations omitted.] (Emphasis added.)

In *First National Bank of Boston* v. *Bellotti* 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978), this court, at 435 U.S. 788-789, enumerated the elements of state interest which may justify interference with the exercise of speech and associational rights in the electoral context:

> Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance. [Citations omitted.] *Preservation of the individual citizen's confidence in government is equally important.* [Citations omitted.] (Emphasis added.)

B. This Court Has Upheld the Constitutionality of Contribution Limitations in Candidate Campaigns

This court in *Buckley, supra,* struck down federal limitations on campaign *expenditures* in candidate elections as improper infringements on First Amendment rights. At the same time, the court upheld the constitutionality of federal limitations on campaign *contributions* in candidate elections. With regard to the effect of contribution limitations on freedom of speech, the court stated, at 424 U.S. 20-21:

> By contrast with a limitation upon expenditures for political expression, a *limitation upon the amount that any one person or group may contribute* to a candidate or political committee *contains only a marginal restriction upon the contributor's ability to engage in free communication.*
>
> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A *limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it* permits the symbolic expression of support evidenced by a contribution but *does not in any way infringe the contributor's freedom to discuss candidates and issues.* While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. (Emphasis added.)

With respect to the freedom of association, the court noted, at 22, that contribution limitations

> also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals . . . [C]ontribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to

> become a member of any political association and to assist personally in the association's efforts . . . And . . . contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy.

Contribution limitations, therefore, contain only a marginal restriction on both the contributor's and the recipient's ability to associate freely.

Having characterized the impact of contribution limitations on a contributor's First Amendment freedoms as a "marginal restriction", the court in *Buckley* was careful not to foreclose the opportunity to demonstrate an impermissible infringement on the exercise of those rights and went on to acknowledge at 21-22 that:

> . . . [C]ontribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *There is no indication,* [in the record] *however, that the contribution limitations imposed . . . would have any dramatic adverse effect on the funding of campaigns and political associations.* The overall effect of . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression. (Emphasis added).

The issue at bar—whether a limitation on contributions to a committee supporting or opposing a ballot measure is constitutionally valid—is one of first impression. Clearly a contribution limitation in ballot measure campaigns must pass the strict scrutiny test in which both a compelling government interest and a closely drawn means of serving that interest must be shown.

C. The "Leading Cases" Provide Little Assistance to This Court

United States v. *National Committee for Impeachment* 469 F.2d 1135 (2d Cir. 1972); *Schwartz* v. *Romnes* 495 F.2d 844 (2d Cir. 1974); *Pacific Gas & Electric Company* v. *City of Berkeley* 60 Cal.App.3d 123, 131 Cal.Rptr. 350 (1976); *First National Bank of Boston* v. *Bellotti, supra; C. & C. Plywood*

Corp. v. *Hanson* 420 F.Supp. 1254 (D. Mont. 1976), affirmed 583 F.2d 421 (9th Cir. 1978); *Frias* v. *Board of Trustees of Ector County* 584 S.W.2d 944 (Tex. Civ. App. 1979); and *Let's Help Florida* v. *Smathers* 453 F.Supp. 1003 (N. D. Fla. 1978) affirmed sub.nom. *Let's Help Florida* v. *McCrary* 621 F.2d 195 (5th Cir. 1980), reveal the development of an erroneous and dangerous line of reasoning.

These cases have failed to distinguish between the public interest in relatively abstract and unfocused discussion of political issues in general on the one hand, and the more real and immediate public interest in a balanced, fair discussion of political issues in the context of a ballot measure campaign on the other hand. The courts' inability to see the basic similarity between the two arenas of the electoral process—the election of representatives to various levels of government and the adoption of public policies through direct legislation—has resulted in the failure to recognize that both are fertile soil for the seeds of corruption. This error has been compounded by the mistaken equation of corruption with nothing more than personal cupidity. The failure both to see the potential for corruption, except in the context of the "bought" politician, and to embrace the generic meaning of corruption has precluded a judicial inquiry which could recognize or define corruption in the context of ballot measure campaigns.

Once a court concludes "corruption" does not and cannot exist in a ballot measure context, then the only remaining subject of regulation is "influence". Having viewed the object of regulation as mere "influence", the courts have concluded that no regulation of any kind is justified. Therefore, the courts have found no need to make any distinction between *prohibitions* of and *limitations* on contributions, nor have the courts found the distinctions between *expenditure* and *contribution* limitations of any value.

These cases are discussed below so that this court may understand fully the reasoning in them.

In *United States* v. *National Committee for Impeachment, supra,* at 469 F.2d 1142, the court disposed of the government's suggestion that the Federal Election Campaign Act of 1971 should apply to a committee which had paid for publication of an advertisement questioning President Nixon's stand on a principal campaign issue—the Vietnam war. The court said:

> On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an

> advertisement would be subject to proscription unless the registration and disclosure regulations of the act in question were complied with. Such a result would, we think, be abhorrent. . . . On the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another.

In *Schwartz* v. *Romnes, supra,* the same court considered whether corporate contributions to a committee seeking to influence the outcome of a ballot measure campaign violated a New York State law prohibiting corporate contributions to political parties, political associations, candidates, "or for any political purpose whatever." The court stated the issue, at 495 F.2d 848, as follows:

> The applicability of the section to NYT's [New York Telephone Company's] contribution [of $50,000] to YES [Yes for Transportation in New York State, Inc.] turns on whether the statute's provision prohibiting corporate payments to any corporation or association organized or maintained 'for political purposes' or payments for 'any political purpose whatever' should be interpreted as barring a corporate expenditure in support of or in opposition to a public referendum. . . .

By the time the *Schwartz* court had framed the issue, it had already characterized the ballot measure campaign as "bipartisan" (at 847) and later "essentially non-partisan" (at 848) and thus apparently apolitical. Textual analysis of the statute in question, legislative history, and comparison with related statutes only further convinced the court that the law should not apply to the problem before it. Yet, as the dissent pointed out (at 855):

> While support for the bond issue might well, and did, include individuals of varying political party affiliation, YES was obviously a fiercely 'partisan' apparatus devoted to influencing the outcome of an election—the passage of a proposition submitted to the body politic. It is thus truly political in the generic and primary sense of that term.

The *Schwartz* court, failing also to understand the generic and primary sense of the term "corruption", equated corruption solely with personal cupidity, and stated, at 851:

> . . . [W]hen the issue is one to be resolved by the public electorate, monies paid by a corporation for public expression of its views create no debt or obligation on the part of the voters to favor the corporate contributors' special interest.
>
> * * *
>
> The public remains completely free to reject the views of the corporate contributor . . . without fear of retribution or non-support by the corporate contributor.

Thus, the *Schwartz* court concluded, at 853:

> Against a background of such attenuated danger, we decline here, as we did in *United States* v. *National Committee for Impeachment* (citation omitted), to ascribe to the legislators an intention to regulate, perchance prohibit, the expression of opinion on fundamental issues of the day.

Having failed to comprehend the political nature of the direct legislative process and the possibility that it is susceptible to corruption, the *Schwartz* court could not distinguish between a general discussion of political issues and the debate in a ballot measure campaign. Moreover, the court's discussion must be viewed in its proper context, i.e., the narrow issue of whether a state corrupt practices act was intended to apply to ballot measure campaigns. See also *State ex rel. Corrigan* v. *Cleveland-Cliffs Iron Co.* 169 Ohio 42, 157 N.E.2d 331 (1959), and *State ex rel. Nybo* v. *District Court of First Judicial District* 158 Mont. 429, 492 P.2d 1395 (1972), wherein the courts held that the legislatures had not intended to include ballot measure campaigns within the term "political." But see *People* v. *Gansley* 191 Mich. 357, 158 N.W. 195 (1916), and *Commonwealth* v. *McCarthy* 281 Mass. 253, 183 N.E. 495 (1932), wherein the courts held that ballot measure campaigns were within the meaning of the term "political".

Accordingly, *National Committee, supra,* and *Schwartz, supra,* afford little assistance here, where this court is presented with legislation specifically designed to eliminate corruption of ballot measure campaigns. Nonetheless, as will be discussed fully below, the language from *Schwartz* has all too freely been taken out of context and inappropriately applied.

In *Pacific Gas & Electric Company* v. *Berkeley, supra,* the California Court of Appeal considered the constitutionality of Berkeley's total prohibition against corporate participation

(both contributions and expenditures) in ballot measure campaigns. Noting that the *Buckley* decision struck down limitations on individual and group expenditures in candidate campaigns and that *Citizens for Jobs and Energy* v. *Fair Political Practices Commission* 16 Cal.3d 671, 129 Cal.Rptr. 106, 547 P.2d 1386 (1976) struck down limitations on individual and group expenditures for passing a ballot measure, the court claimed that the only distinction in the *Pacific Gas and Electric* case was the question of corporate activity. Thus, the court failed to consider the distinction between prohibitions and limitations or between expenditures and contributions. Accepting the narrow concept of corruption espoused in *Schwartz,* the court concluded at 60 Cal.App.3d 128-129:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.

After the decision of the Montana Supreme Court in *State ex rel Nybo, supra,* the Montana legislature amended the state corrupt practices act specifically to preclude corporations from making expenditures or contributions in ballot measure campaigns. In *C. & C. Plywood Corp.* v. *Hanson,* 420 F.Supp. 1254 (D. Mont. 1976), the United States District Court considered the constitutionality of that act as amended. The *Hanson* court repeated the Montana Supreme Court's characterization of ballot measure campaigns as "legislative" rather than "political", and held, at 1263:

> Though the initiative here is not 'political' *per se,* the principle articulated by the *Buckley* court [invalidating expenditure limitations in candidate campaigns] is the same.

Failing to apprehend the generic and primary sense of the term, "political", and thus ignoring the political nature of the ballot measure process and the potential for corruption therein, the court in *Hanson* did not even discuss the difference between prohibitions and limitations or between contributions and expenditures. The *Hanson* court was further hampered because it

was presented with no evidence to show the presence of corruption in the ballot measure process; there was no evidentiary hearing. Thus, the court was forced to conclude, at 1265, that the attempts of the legislature to balance simple "influence" on the electorate by monied interests were not warranted by any government interest sufficiently compelling to justify infringement on First Amendment freedoms.

Neither the District Court in *Hanson* nor the California Court of Appeal in *Pacific Gas and Electric* took cognizance of the possibility that regulation of campaign contributions can be justified by a proper evidentiary showing. As this court stated in *First National Bank of Boston* v. *Bellotti, supra,* at 435 U.S. 789, the arguments for the proposition that corporate ballot measure campaign contribution and expenditure prohibitions serve compelling interests of the state would merit consideration if the potential for, and the appearance or reality of, corruption were made evident by the record or legislative findings.

Having no record on which to rely and unwilling to accept the potential for corruption in direct legislation as self-evident, the risk of corruption was simply not viewed as present by the *Bellotti* court, at 790-791:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' (Citation omitted) ... '[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the first Amendment....' (Citation omitted.)

Moreover, the court in *Bellotti* cautioned, at 791, that the government must avoid any action that smacks of paternalism. The people in a democracy are entrusted with the responsibility for evaluating conflicting arguments, and government is forbidden to assume that task lest the people lose the ability to govern themselves. The *Bellotti* court therefore concluded at 792:

> ... [I]f there be any danger that the people cannot evaluate the information and arguments advanced [by a corporation], it is a danger contemplated by the framers of the First Amendment. [Citation omitted.]

Once ballot measure campaigns were seen as beyond the pale of potential for corruption (within the narrow definitions of that term as adopted by the above enumerated decisions), of the appearance or reality of corruption, and of compelling governmental interest to regulate, a logical solecism was now available. The distinction between prohibition and limitation became secondary, as did the distinction between expenditure and contribution. Any attempt to regulate the role of money in ballot measure campaigns was quickly dismissed.

The U. S. Court of Appeals in affirming *C. & C. Plywood Corp.* v. *Hanson,* 583 F.2d 421 (9th Cir. 1978), argued that even if the Montana statute in question prohibited only corporate contributions, rather than both contributions and expenditures, it still applied to ballot measure, rather than candidate, campaigns. Since ballot measure campaigns did not have the same potential for corruption, the state had no compelling interest in prohibiting corporate participation (at 425).

In *Frias* v. *Board of Trustees of Ector County, supra,* the court was asked whether a state law prohibiting corporations and labor organizations from making contributions or expenditures in ballot measure campaigns was constitutionally valid. The court noted the recent *Bellotti* decision and struck down the Texas law. 584 S.W.2d 948. There was no discussion of the particular facts of the case before it, in which several corporations had contributed to a committee for promoting passage of a school bond issue, and whether contributions might reasonably be distinguished from expendutures, or limitations from prohibitions.

The U.S. District Court in *Let's Help Florida* v. *Smathers, supra,* lacking evidence to the contrary, freely applied the rationale of *Schwartz* and *Bellotti* involving absolute *prohibitions* of contributions *and* expenditures to mere *limitations* of contributions *alone* because it thought there was little threat of corruption (within the limited meaning given to that term by prior cases) and therefore insufficient compelling interest in regulation. 453 F.Supp. 1013.

The 5th Circuit, affirming this decision sub. nom. *Let's Help Florida* v. *McCrary, supra,* pointed out, at 621 F.2d 199,

that the sole governmental interest "recognized as a justification for restricting contributions was the prevention of quid pro quo corruption between a contributor and a candidate." This proposition is more properly stated thus: the sole governmental interest recognized in *Buckley* as a justification for restricting contributions in a candidate campaign was the prevention of quid pro quo corruption. The U.S. Court of Appeals continued, *id.*:

> The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections.

As we shall see below, this conclusion was too hasty, but the 5th Circuit considered, and rejected, only one other possible justification: the problem of adequate disclosure. 621 F.2d 200-201.

The myopic analysis in and logical insufficiency of the above decisions are in and of themselves dangerous. But the problem is exacerbated by the absence of any attempt to prove that money can corrupt the process as much or more than the individual. Finally, it is important to note that the cases above are distinguishable from the instant case.

United States v. *National Committee for Impeachment, supra,* struck down the application of the Federal Election Campaign Act of 1971 to a political discussion outside the ballot measure context. *Schwartz* v. *Romnes, supra,* struck down the application of a state corrupt practices act because it determined that a ballot measure campaign was not "political" within the meaning of the act. *Pacific Gas & Electric Company* v. *City of Berkeley, supra,* struck down a *total prohibition* against corporate participation in ballot measure campaigns, as did *C. & C. Plywood Corp.* v. *Hanson, supra, First National Bank of Boston* v. *Bellotti, supra,* and *Frias* v. *Board of Trustees, supra.*

The only case to date which is entirely on point is *Let's Help Florida* v. *Smathers, supra,* affirmed sub. nom. *Let's Help Florida* v. *McCrary, supra.* When that case is compared to the case at bar, evidentiary deficiencies are apparent in both. In which decision then—that of the 5th Circuit or that of the California Supreme Court—is the analysis more thorough? Unwilling to rely on the logical solecism which emerged from the "leading cases," the California Supreme Court examined afresh the nature of the direct democratic process and the meaning of corruption to arrive at its decision. That analysis deserves the affirmation of this court.

D. The Meaning of Corruption

The definition of corruption in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d.ed.) provides a helpful starting point.

> 1. A corrupting, or state of being corrupt; specif.: a. Decay; decomposition or putrefaction;—now only of decomposition following death. b. Impairment of integrity, virtue, or moral principle; depravity; impurity; specif., inducement (of a person) by means of improper considerations to commit a violation of duty. [They abstained from some of the worst methods of *corruption* usual to their party in its earlier days.—*Bancroft.*] c. Act of changing, or state of being changed, for the worse. d. A departure from what is pure, simple, or correct; as, a *corruption* of style; *corruption* in language. 2. An instance of making or becoming corrupt; a result of perversion; as, the *corruptions* of the church; specif., a deteriorated usage in a language or reading in a text. 3. A product of decomposition or putrefaction; putrid matter; pus. *now dial.* 4. An agency or influence that corrupts. [Right so is a wicked priest *corruption.*—*Chaucer.*] 5. Evil or irrascible nature. *now dial.* [My *corruption* was rising.—*Galt.*] 6. *obs* a. Infection; taint. b. Destruction. *syn* PUTRESCENCE, POLLUTION, DEFILEMENT, CONTAMINATION, DEPRIVATION, DEBASEMENT, ADULTERATION, TAINT. *ant* PURIFICATION, AMELIORATION, REFORMATION.

It is evident that the ordinary dictionary meaning of corruption embraces more than the compromising of public officials. The possibility is now recognized by political scientists. See, for example, L. BERG, H. HAHN, J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM (1976) in which the authors point out the necessity for broadening the analysis of political corruption beyond traditional concepts of personal cupidity to include the "fundamental or systemic corrupting influences" that excessive amounts of money can bring to bear on self-government.

In San Francisco's ballot measure campaign contribution limitation case, the City presented testimony by one of the authors of CORRUPTION IN THE AMERICAN POLITICAL SYSTEM, *supra.* In his testimony, Professor Berg elaborated on the meaning of systemic corruption and provided the evidentiary basis for the City's position that the unlimited right to make

large contributions to campaign organizations departs from what is "pure" and "correct" in ballot measure elections and creates the conviction in the minds of the electorate that the democratic processes have been perverted, thereby impairing the institutions of government and undermining the confidence of the governed in the legitimacy of the government and its laws.[4] Thus, corruption means more than the quid pro quo which transforms a financial gift into a political debt for the individual politician and can include departure from and perversion of the concept of direct democracy.

E. The Potential For Corruption In Ballot Measure Campaigns

The Supreme Court of Michigan, in *People* v. *Gansley, supra,* rejected the argument that Michigan's corrupt practices act was not intended to apply to ballot measure campaigns, specifically a local option election. The court observed, at 191 Mich. 365-366:

> That partisan zeal and spirit are as intense when canvassing and voting upon the question of local prohibition of the liquor traffic, as when canvassing and voting for candidates for office, is too evident to need discussion.

And again, at 366:

> When the word "political" is used as it is in this act, even if held to qualify the words "principal or measure," it is a narrow construction to hold that it applies to one or more of the recognized political parties only. The word has a much broader meaning, and often refers to matters of public policy. The first three definitions of the word as given by Webster are:
>
> "1. Of, or pertaining to polity, or politics, or the conduct of government, referring in the widest application to judicial, executive and legislative branches; of or pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of government; relating to the management of affairs of State; as, *political* theories.
>
> "2. Having, or conforming to a polity, or settled system of administration; as a *political* body or government.

---

[4] Systemic corruption in the context of ballot measure campaigns is discussed by another political scientist, Professor John Shockley, in section F. below.

> "3. Of or pertaining to the exercise of the rights and privileges or the influence by which the individuals of a State seek to determine or control its public policy; having to do with the organization or action of individuals, parties or interests that seek to control the appointment or action of those who manage the affairs of State; as, his *political* affiliations were with the Republicans."
>
> See also, Black's Law Dictionary, defining "Political." (Emphasis in original.)

In *Commonwealth* v. *McCarthy, supra,* defendant, an elected alderman of the City of Lawrence, was found guilty of violating a state law prohibiting a public official from directly or indirectly demanding, soliciting or receiving any thing of value for the political campaign purposes of any candidate for public office or of any political committee "or for any political purpose whatever". Defendant contended that the law was intended to cover only situations where the purpose of collecting money was personal gain or gain of a political party. The court disagreed, at 281 Mass. 259:

> The word 'political' in its ordinary meaning is not limited to something pertaining merely to the actual management of a government by individuals for the time holding office thereunder. The essential significance in the proper and ordinary use of the word includes anything pertaining to the establishment of a form of government. Every citizen has the right to concern himself with the form of charter under which the affairs of his city shall be conducted. This is a political right since it has to do with the fundamental plan by which the city shall be governed. A purpose to influence the exercise of political rights is a political purpose. One who has sought and attained office under a certain form of charter may in a legitimate manner pursue the political purpose of resisting any change in that charter. If he directly or indirectly collects or receives money in furtherance of that political purpose, he is doing what the statute has forbidden and made a crime.

Two primary activities of elected government officials are the consideration and adoption of legislation. The citizens of American cities, counties and states also consider and decide on legislation through the initiative and referendum processes. The laws of a democratic government inevitably affect the disparate interests of its varied citizenry. Whether made

indirectly through elected representatives or directly by voters, the legislation necessarily calls into play competing economic and social interests. These may be overt or covert.[5] Moreover, it is not uncommon that the political fortunes of candidates for, and incumbents of, elective office may rise or fall on the outcome of such legislation.[6] Hence, it is not surprising that ballot measure campaigns, like candidate campaigns, are fertile soil in which the seeds of corruption may grow.[7]

F. The Appearance and Reality of Corruption in Ballot Measure Campaigns

Once it is shown that a ballot measure campaign, like a candidate campaign, is a political phenomenon in which powerful economic and social interests are at stake and in which

---

[5] See *Brown* v. *Superior Court* 5 Cal.3d 509, 522-523, 96 Cal.Rptr. 584, 487 P.2d 1224 (1971) for a discussion of the reasons why the Legislature may enact more comprehensive contribution disclosure requirements for ballot measure campaigns than for candidate campaigns. See also the discussion of Justice Mulligan, dissenting, in *Schwartz, supra,* at 495 F.2d 857-858, wherein he points out that the New York Telephone Company contributed to the YES Committee in order to curry favor with the governor of New York State.

[6] See *Commonwealth* v. *McCarthy, supra,* and *Schwartz, supra.* See also Endicott, *A Fixture in California—More Than 140 Proposals Since 1912,* L.A. Times, October 22, 1972, §F at page 5; Lee, *California,* In REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (Butler and Ranney, eds. 1978), abr. as Lee, *The Initiative and Referendum: How California Has Fared,* 68 NAT'L. CIV. REV. 69 (1979); Richman, *Election Law,* 1979 ANN. SUR. AM. L. 285, 294. Lee observes that this phenomenon is particularly strong in California because of weak political parties and predicts that the connection between candidates and ballot measures will occur still more frequently as party ties continue to weaken. The danger that large contributions in ballot measure campaigns will be transformed into a political debt is not addressed by disclosure laws. Contribution limitations do address this problem, however.

[7] The growing awareness of this fact in the academic, legal and political communities is well documented. A partial list of governmental and non-governmental studies concerning California includes: Cottrell, *Twenty-Five Years of Direct Legislation in California,* 3 PUB. OP. Q. 30, 42-44 (1939); KEY and CROUCH, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (1939), 507-526; Radin, *Popular Legislation in California,* 23 MINN. L. REV. 559, 581-583 (1939); Radin, *Popular Legislation in California: 1936-1946,* 35 CAL. L. REV. 171, 187 (1947); Radabaugh, *Tendencies of California Direct Legislation,* 42 S.W. SOC. SCI. Q. 66, 76-78 (1961); California Legislature, Assembly Interim Committee on Constitutional Amendments, Public Hearing on the Initiative Process (1965); Endicott, *supra*; Mathews, *The Ballot Initiative: Whom Does It Serve?* L.A. Times, October 22, 1972, §F at 4; California Legislature, Assembly Committee on Elections and Reapportionment, Public Hearing on the Initiative Process (1972); Diamond, et al, *California's Political Reform Act: Greater Access to the Initiative Process,* 7 S. W. U. L. Rev. 453 (1975); Notes, *The California Initiative Process: A Suggestion for Reform,* 48 S. CAL. L. REV. 922 (1975); Lee, *supra* (1978, 1979).

political and personal fortunes can be made and destroyed, it can be demonstrated that a ballot measure campaign has a potential for corruption. However, the effect of the corruption on the confidence of the electorate in their government can be fully understood only in the context of the role and purpose of direct legislation in a democratic society.

Direct legislation—the initiative and referendum—was introduced widely in America during the early Twentieth Century, when corporations and wealthy individuals were freely acknowledged to have gained control of the electoral process, and through it, representative government itself. Direct legislation was seen as an antidote to such corruption. Diamond, *supra.* Although the rhetoric of the public debate at the time may seem idealistic and simplistic to us now, it nonetheless reveals the nature of the problem and the intent of the solution. Woodrow Wilson called direct legislation "the gun behind the door" which would keep bosses and politicians honest (Mathews, *supra*). And Theodore Roosevelt articulated the egalitarian principles underlying direct legislation, as follows:

> Popular rule means not that the richest man in the country is given less than his right to share in the work of guiding the government; on the contrary, it means he is guaranteed just as much right as anyone else, *but no more* [sic]—in other words, that each man will have his full share as a citizen . . . (Roosevelt, *National and Popular Rule,* 97 OUTLOOK 96 [1911] at 96).

Randolph Bourne, Jr., an Oregon senator, proclaimed the indispensability of direct legislation in ensuring broad participation in self-government:

> The [initiative] system encourages every citizen, however humble his position, to study the problems of government, city and state, and to submit whatever solution he may evolve for the consideration and approval of others. (Bourne, Jr., *Initiative, Referendum, and Recall,* 109 ATLANTIC MONTHLY 122 [1912] at 125-126).

Perhaps the most compelling statement on the relationship between direct legislation and the fostering of a truly democratic society was made by Hiram Johnson, who successfully campaigned for the governorship of California with the promise that he would support direct legislation:

> If we can give to the people the means by which they may prevent the misuse of power . . . then all that lies within our

> power will have been done in the direction of safeguarding the future and . . . the perpetuation of the theory upon which we ourselves shall conduct the government. (*Sacramento Bee,* January 4, 1911, at 1, quoted in Diamond, *supra,* at 456-457, footnote 13.)

Californians agreed with Governor Johnson and approved a constitutional amendment providing for direct legislation by a three-to-one margin (168,744 to 52,093 votes). State of California, Statement of the Vote of California, Special Election, October 10, 1911, at 5, quoted in Diamond, *supra,* at fn. 14, p. 457.

The integrity of the direct legislative process is safeguarded by the California Constitution. Article 2, Section 10(c), provides:

> The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.

California courts are zealous to protect both the spirit and the letter of the direct legislative process against interference by all three branches of the government. Cf. *Schmitz* v. *Younger* 21 Cal.3d 90, 145 Cal.Rptr. 517, 577 P.2d 652 (1978); *Committee for Sewer Referendum* v. *Humboldt Bay Wastewater Authority* 77 Cal.App.3d 117, 143 Cal.Rptr. 463 (1978). Underlying the vigorous judicial protection of this precious right is a recognition of its importance to the people of California.

State Senator Haynes was perhaps the first Californian to comment on the salutary effect of direct legislation on the confidence of this State's citizens in their government. Six years after the California Constitution was amended to provide for it, Senator Haynes found its promises fulfilled. "Californians feel that . . . all the affairs of the people are in the hands of all the people . . . all the time, and this is what we believe is meant by democracy." Haynes, Direct Government in California, Sen. Doc. 738, 64th Cong., 2d Sess., 1917, at 5. Citing statistics showing that direct legislation had promoted voting, Senator Haynes attributed this effect to the people's realization that "public affairs are their 'private affairs' in a sense which has never been true before." Haynes, *supra,* at 10-11.

Direct legislation, then, was intended to correct the corrupt situation in candidate campaigns by returning government to the hands of "all of the people all of the time," thus making public interests equivalent to private interests and encouraging more participation in the electoral process. This in turn would enhance popular faith in the democratic system, engender a willingness to accept the laws thus passed, and, finally, promote the stability of government and society. For a short time, direct legislation appeared to work as intended.

Then, as it was perceived that large contributions to political committees supporting or opposing a ballot measure were used as a covert quid pro quo, that such contributions virtually eliminated the need to involve affected citizens or at least the less affluent among them, and that large contributions often "bought" a ballot measure outcome, participation in campaigns and voting again diminished, and alienation once more set in. Because direct legislation has been considered a "last resort" in the democratic process, it has been even more sensitive to the appearance and reality of corruption.

We have already mentioned the use of large contributions in ballot measure campaigns as a covert form of the quid pro quo; see footnote 6, *supra*. The following statistics show how the unlimited right to make large contributions has provided little incentive to involve residents and ordinary individuals in ballot measure campaigns.

During 1978, in Long Beach, California, an initiative appeared on the ballot calling for voter approval or disapproval of a lease already signed by the City for construction of an oil storage terminal by Sohio. The City of Long Beach had approximately 160,000 registered voters.[8] The financing of the campaign was reported as follows:[9]

Proponents:

Long Beach Civic Action Committee

Sohio Natural Resources Co. (Cleveland, OH)	$ 16,374
Sohio Transportation Co. (Cleveland, OH)	41,512
The Standard Oil Co. (Cleveland, OH)	806,682
Contributions $1,000 or over	864,568
Contributions under $1,000	–0–
Total Campaign Contributions	$864,568

[8] LYDENBERG, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS (1979), at 35.

[9] *Id.*, at 37.

Opponents:
Coalition of Neighborhood and Community Associations to Stop Sohio

Contributions $1,000 or over	$ –0–
Contributions under $1,000	17,721
Total Campaign Contributions	$17,721

In June, 1980, three noteworthy ballot measures were rejected by California voters state-wide. One initiative sought to circumscribe smoking in public places. It was financed as follows:[10]

Proponents:
Californians for Smoking and No Smoking Sections

Contributions under $1,000	$525,356
Contributions over $1,000	
$1,000—$5,000 (18)	32,243
$5,000—$10,000 (2)	10,821
American Cancer Society (Oakland)	77,835
American Lung Assn. of CA (Oakland)	10,316
Lung Assn. of Los Angeles	35,980
Total Contributions over $10,000	124,131
Total Contributions over $1,000	167,195
Total Campaign Contributions	$692,551

Opponents:
Californians Against Regulatory Excess

Contributions under $1,000	$ 16,974
Contributions over $1,000	
$1,000—$5,000 (5)	7,690
$5,000—$10,000 (1)	7,120
American Brands	50,000
Brown & Williamson	458,463
Lorillard	303,127
Philip Morris	882,000
R. J. Reynolds	999,834
Total Contributions over $10,000	2,693,424
Total Contributions over $1,000	2,708,234
Total Campaign Contributions	$2,725,208

Another initiative would have imposed a tax on large oil, gas, coal and uranium companies and used the revenue to finance public transportation and the development of alterna-

[10] LYDENBERG, BANKROLLING BALLOTS: 1980 UPDATE (Manuscript for Spring, 1981, publication), at 33-34. These are not final figures. We have summarized the data and have reached totals differing from the author's.

tive energy sources. California's governor strongly supported the measure, and a former official of his administration ran the campaign.[11] It was financed as follows:[12]

Proponents:

California Oil Profits Coalitions/Citizens to Tax Big Oil

Contributions under $1,000	$168,991
Contributions over $1,000	
$1,000—$5,000 (54)	83,700
$5,000—$10,000 (10)	61,500
Corporate Trust Account	12,000
Headland Properties	15,168
Louis Tompkins	16,000
Total Contributions over $10,000	43,168
Total Contributions over $1,000	188,368
Loans—Total Loans	106,500
Total Campaign Contributions and Loans	$463,859

Opponents:

Californians for Fair Taxation

Contributions under $1,000	$ 108,232
Contributions over $1000	
$1,000—$5,000 (75)	314,449
$5,000—$10,000 (20)	129,657
AMINOIL	62,967
Atlantic Richfield	542,634
Bankamerica	25,000
Conoco Oil (Houston, TX)	27,443
Douglas Oil	62,761
Edgington Oil	12,497
Exxon	242,031
General Electric Co. & Utah Int'l. Inc.	25,000
Getty Oil	214,797
Gulf Oil (Houston, TX)	165,378
Kernridge Oil (Houston, TX)	62,474
Mobil Oil	384,566
Natomas Company	10,870
Occidental Petroleum (Houston, TX)	12,500
Pauley Petroleum	12,497
Pennzoil (Houston, TX)	50,000
Shell Good Government Fund	636,794
Standard Oil, California	1,079,663
Standard Oil, Indiana	50,000
Standard Oil Co. (SOHIO)	159,776
Sun Oil Co. of Pennsylvania	25,175

[11] *Id.*, at 35.

[12] *Id.*, at 38-40. We have summarized the figures; our totals do not agree with the author's.

Tenneco	62,500
Texaco	263,615
Tosco	176,635
Union Oil Co. of California	549,032
Union Pacific	62,424
Total Contributions over $10,000	4,979,029
Total Contributions over $1,000	5,423,135
Loans—Total Loans	407,000
Total Campaign Contributions and Loans	$5,938,367

Finally, a third initiative sought to repeal all existing rent control ordinances. It was opposed, among others, by the governor and the mayor of Los Angeles.[13] It was financed as follows:[14]

Proponents:	
Contributions under $1,000	$1,893,724
Contributions over $1,000	
$1,000—$20,000 (957)	3,196,089
$20,000—$50,000 (30)	915,542
Bank America Realty Investors (San Francisco)	54,012
Brandenburg, Staedler & Moore Real Estate Development (San Jose)	55,000
The Irvine Company (Newport Beach)	82,250
Park Newport Ltd. (San Francisco)	62,100
Taube Associates, No. 205 (Belmont)	90,500
Total Contributions over $50,000	343,862
Total Contributions over $1000	4,455,493
Loans—Total Loans	401,000
Total Contributions and Loans	$6,750,217
Opponents:	
Contributions under $1,000	$157,897
Contributions over $1,000	
$1,000—$5,000 (14)	24,157
Total Contributions over $1,000	24,157
Loans—Total Loans	12,242
Total Contributions and Loans	$194,296

Can the political committee which relies on large contributions buy the outcome of a ballot measure campaign? As Appellants herein point out, at p. 26 of their brief to this court, students of this subject agree only that money is but one factor

[13] *Id.*, at 98.

[14] *Id.*, at 99-101. We have summarized some of the figures and reached totals differing from the author's.

in the outcome. Appellants assert, at p. 27 of their brief, that between 1954 and 1974 in California, in 28 controversial ballot measure campaigns, the side that spent the most won only 50% of the time. Compare, however, LYDENBERG (1980), *supra,* at p. 1, where he finds that of 19 recent nationwide campaigns examined, the side with corporate backing outspent opponents by better than 2 to 1 in 15 campaigns and won in 12 of them. According to a May 6, 1981, telephone conversation with Professor Larry Sabato (Department of Government, University of Virginia), his forthcoming work, THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS (Random, Basic Books, September, 1981), notes, at Chapter 3, that money in ballot measure campaigns is probably more influential than in candidate campaigns.

The point is not how much money a political committee raised, but rather how it raised the money. A measure which passes because every affected citizen contributed a dollar to a committee in support of it is much more compatible with the goal of direct legislation than a measure which passes because a few distant corporations or millionaires contributed an equal amount to that committee. Moreover, the point is not how people voted, but how many people did not vote and why. The point is not whether the outcome was bought, but rather how it was perceived.

Has the injection of unlimited contributions to political committees in ballot measure campaigns undermined citizen participation in the campaigns themselves, hastened the decline of voting, and furthered alienation from government and its laws? Appellants assert, as pp. 27-28, that no such results have occurred. But see Notes, *supra,* fn. 75 at 936-937, and Shepard, *Participation in Local Policy-Making: The Case of Referenda,* 56 SOC. SCI. Q. 55 (1975) at 69-70. See also BERG, HAHN and SCHMIDHAUSER, *supra,* and U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Hearings on the Voter Initiative Constitutional Amendment (1978).

The concept of systemic corruption in ballot measure campaigns is well-illustrated by an article prepared for the above-mentioned Senate hearings by Professor John S. Shockley. Following statewide ballot measure campaigns in Colorado during 1976, Professor Shockley sought to investigate the widespread belief that the election had been "bought." Professor Shockley concluded, at 187-188:

Of greatest merit seem to be the criticisms about the lack of any limit on campaign contributions which anyone—citizens, corporations, or unions—could give to a campaign. As long as wealth continues to be so unevenly distributed among the populace, and as long as it remains so much easier for vested interests to spend money than for citizens and groups who stand to receive no direct personal advantage from the results to do so, the initiative results are likely to be skewed in the direction of existing power. But citizen-initiated proposals (as distinct from those referred by the legislature) are likely to continue to challenge the existing structure—either from the right or the left—for the simple reason that if proponents could get their measures passed by the legislature, they would not need to use initiatives. The Colorado Daily may have been correct, however, when it charged that "What was lost on Tuesday was more than . . . good amendments. *The big money boys have undoubtedly put a chill on the efforts of citizen groups to put issues on the ballot. Obtaining the needed signatures for an initiative is hard work, and nobody wants to waste his or her time if all is to be stomped under the bankrolls of those with power.*"

As long as corporations are as powerful as they are, and have the money that they have, and as long as they face no limitations on the amount of money they can spend in political campaigns, they have a very good chance of preventing legislation which they do not like. This is true particularly when contrary ideas and evidence do not easily reach the voters, as the interviewing on several of the initiative campaigns indicated so poignantly.

* * *

The pluralist vision of an American politics which reflects the wills of the diversity of the American people seems to be swamped by the extraordinary inequality of campaigns. *If the initiative is to be used* as a mechanism for new ideas, and *as a way for citizens to speak directly to issues, it would seem that some way would have to be devised to allow voters a reasonable, intelligent choice, to allow those without money and power, or with unpopular opinions, a chance to get their ideas across to the public.* Free access to the media during the campaign, limits on television and radio advertising techniques, and *limits on the amount of contributions corporations and others could make to cam-*

paigns would all be a start in this direction. Without important mechanisms to insure for this, the result may be a caricature of an informed citizenry voting on the basis of alternatives presented to them.

This study did not find Colorado citizens apathetic, cynical, or ignorant towards the initiatives. The majority of people were interested in the issues and did have ideas on them. But on several proposals their ideas tended to reflect the latest polling techniques, campaign strategies and gimmicks of those with the most power and money. *The corrosive impact of this unregulated, grossly unequal power perverted the democratic process in a manner for all to see, whether or not the final election results were to one's liking.* (Emphasis added.)

G. The Compelling Interests Of The State In Regulating Ballot Measure Campaigns

It should require no argument that a truly democratic ballot measure campaign achieves the goals, enumerated in *Bellotti, supra,* of (1) preserving the integrity of the electoral process; (2) preventing corruption; (3) sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government; and (4) preservation of the individual's confidence in government.

It cannot be gainsaid that democratic government's claim to legitimacy rests in large part on the commonly held existential conviction of western civilization that a democracy is of the people, by the people, and for the people. It is clear that this legitimacy is undermined when the government is in fact controlled, or appears to be controlled, by an affluent minority.

Even if people cannot be manipulated by slick advertising blitzes, enormous expenditures of money launched for or against various legislative proposals placed before the people necessarily will detract from the willingness of those on the losing side to accept the majority verdict. The first step to social disruption in a democratic society is the breakdown in the confidence of the governed in the legitimacy of the governors and their laws. This is especially true in the ballot measure context involved in the instant case. The preservation of the willingness to accept the law is the most compelling of all governmental purposes. For with the breakdown of this consensus comes the destruction of the government. It is beyond dispute that in a democratic society the government is entitled to protect itself from destruction. Nor can it be

disputed that to the extent that people believe that the government is controlled by monied influences rather than by the citizens, their conviction in the legitimacy of the government and their willingness to defer to its authority are severely impaired and the authority of the government as an institution of social order is undermined.

H. Contribution Limitations to Political Committees Serve These Interests Without Broad Infringement on Basic Political Freedoms

Contribution limitations in ballot measure campaigns impose only a marginal restriction on the contributor's freedom of speech. As the court stated in *Buckley, supra,* at 424 U.S. 20-21:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Moreover, contribution limitations do not in any way curtail direct expenditures by any individual or organization in promoting or opposing any ballot measure. Any law which encourages those interested in the outcome of an election to engage in direct communication with the voters certainly promotes the integrity of the electoral process in general and prevents the corruption of the ballot measure process in particular. By encouraging direct participation while curbing excessively concentrated money contributions, contribution limitations also serve to foster and nourish an alert citizenry which is aware of and involved in the debate over issues in the marketplace of ideas. And, in lessening the appearance of control of the electoral process by a wealthy minority, contribution limitations further citizen confidence in government.

Contribution limitations in ballot measure campaigns impose only a marginal restriction on the contributor's freedom of association. Making a contribution serves to affiliate a person with a committee seeking to further a political viewpoint on a ballot issue, and it enables like-minded persons to pool their resources in furtherance of common political goals. Thus, while contribution ceilings perhaps limit one means of political association, they leave the contributor free to become a member of any political group and to assist personally in the organization's efforts. See *Buckley, supra,* at 22. Again, any law which

encourages those interested in the outcome of an election to become personally active, in a political association as well as directly, furthers the compelling governmental interests recognized in *Bellotti, supra.*

Likewise, contribution limitations in ballot measure campaigns impose only a marginal restriction on the recipient's freedoms. Contribution limitations do not prevent a political committee from raising funds, but merely require that it seek those funds from a larger number of people. *Buckley, supra,* at 21-22. A statute which does not necessarily prevent a committee from amassing the resources needed for effective advocacy, while requiring the committee to raise funds from a greater number of people, serves to promote the integrity of the ballot measure process and to prevent the appearance as well as the reality of its corruption. And by requiring a larger pool of contributors to finance campaigns, contribution limitations again serve to sustain an active and alert body politic and to nurture confidence in democratic government.

In view of the foregoing, it is clear that contribution limitations in ballot measure campaigns are not attempts to impose paternalistic safeguards for fear that the voters will not be able to weigh and evaluate the voices they hear. Nor will limitations on contributions narrow the scope or depth of discussion on an issue. Rather, by encouraging broader participation in the debate over ballot measures, they promote more vigorous discussion among the citizenry.

The *Buckley* court addressed the claim that the $1,000 contribution limit for any candidate was unrealistically low because it was not narrowly drawn so as to distinguish between expenses necessary in House, Senate and presidential elections, stating at 30:

> While the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for house, senate, and presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeal has observed, '[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000 (citations omitted).' Such distinctions in degree become significant only when they can be said to amount to differences in kind. (Citations omitted)

In light of *Buckley, supra,* once a court finds that some limit is permissible, then the determination of the amount of contribution limit rests solely in the province of the legislature, unless the limitation is found to be so unreasonable as to constitute arbitrary or capricious action.

The $1000 contribution limit for, among other things, presidential campaigns, was upheld by the court in *Buckley, supra.* If the $1000 contribution limit is not unreasonable in the context of a national presidential campaign, it can hardly be argued that the $250 limitation in this case for a single local ballot proposition is too low and therefore unreasonable. It is submitted that under *Buckley, supra,* the $250 campaign contribution limit is clearly within the bounds under the First and Fourteenth Amendments.

CONCLUSION

In view of the minimal attempt by the City of Berkeley to sustain its position by competent evidence, it is respectfully submitted that this court should limit its decision to the record herein. This court should refuse to preclude other governments from defending their contribution limitations in ballot measure campaigns. When governments adopt laws designed to protect and promote the constitutionally guaranteed right of the people to direct legislation, those governments deserve a fair and full opportunity to defend their legislative decisions in the courts.

DATED: May 15, 1981

Respectfully submitted,

GEORGE AGNOST,
City Attorney
BURK E. DELVENTHAL
Deputy City Attorney
ELIZABETH M. KATZ
Legal Assistant
For *Amicus Curiae*
City and County of
San Francisco

Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-737
IN THE

Supreme Court of the United States

October Term, 1980.

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION, PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

On Appeal From the Supreme Court of the State of California.

Brief of the City of Santa Monica, California, as Amicus Curiae in Support of Appellees.

ROBERT M. MYERS,
City Attorney,
STEPHEN S. STARK,
Assistant City Attorney,
SUSAN L. CARROLL,
Deputy City Attorney,
City Hall,
1685 Main Street,
Santa Monica, Calif. 90401,
(213) 451-4704,
Attorneys for the City of Santa Monica, California, as Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 2

Summary of Argument 3

Argument 6

I.

The Initiative and Referendum Process Is Essential to Democratic Government in California and Must Be Protected From the Undue Influence of Moneyed Interests 6

II.

Ballot Measure Campaign Contributions, Like Contributions to Candidate Campaigns, May Constitutionally Be Limited to Prevent Corruption of the Electoral Process 10

III.

The Berkeley Ordinance Is Narrowly Tailored to Prevent Perversion of the Electoral Process by Moneyed Interest While Imposing Only a Minimal Burden on the Exercise of First Amendment Rights 15

IV.

Conclusion 20

TABLE OF AUTHORITIES

Cases — Page

Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) 6

Brown v. Superior Court, 5 Cal. 3d 509, 96 Cal. Rptr. 584 (1971) 6, 7, 14, 15

Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (en banc), aff'd in part, 424 U.S. 1 (1976) 3, 10, 11, 16, 17, 18, 19, 20

Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819, 167 Cal. Rptr. 84 (1980) 3, 4, 9, 10, 11, 12, 13, 14, 15, 17, 19

Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973) 11

Consolidated Edison v. Public Service Commission, ... U.S. ..., 65 L. Ed. 2d 319 (1980) 10

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 3, 11, 12, 13, 16, 20

Gayle v. Hamm, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1972) 9

James v. Valtierra, 402 U.S. 137 (1971) 6

Johnson v. Hamilton (1975) 15 Cal. 3d 461, 125 Cal. Rptr. 129, 541 P.2d 881 9

Keist v. City of Santa Monica, L.A. Sup. Ct., Case No. C 271814 2

Let's Help Florida v. McCrary, 621 F.2d 195 (5th Cir. 1980), appeal docketed No. 80-970 (December 8, 1980) 13

Mervynne v. Acker, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (1961) 6

Page

Constitutions

California Constitution, Art. II, Sec. 1 6
California Constitution, Art. XI, Sec. 5 2
United States Constitution, First Amendment .....
..... 4, 5, 10, 11, 15, 17, 18, 19, 20

Miscellaneous

Report of Special Committee, 1923 Journal of the Senate, May 14, 1923, pp. 1780, 1782-83, 1785 .....
..... 7, 8, 13, 15

Rules

Rules of Court, Rule 36 1

Statutes

Berkeley Reform Act of 1974, Sec. 602.....
..... 3, 9, 16, 19, 20, 21
California Elections Code, Secs. 11500 et seq. 8
California Elections Code, Sec. 22808 ..... 2, 8
California Government Code, Secs. 81000 et seq..... 8
California Government Code, Sec. 81013 8
California Statutes of 1921, Ch. 483, Sec. 983 6
Santa Monica Municipal Code, Secs. 11201-11215 ... 2
Santa Monica Municipal Code, Sec. 11209 2

No. 80-737
IN THE

Supreme Court of the United States

October Term, 1980.

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ; EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

Brief of the City of Santa Monica, California, as Amicus Curiae in Support of Appellees.

The City of Santa Monica, pursuant to Rule 36 and with the consent of all parties filed herewith, submits the following amicus curiae brief in support of appellants City of Berkeley, *et al.*

Interest of *Amicus Curiae*.

The City of Santa Monica is a municipal corporation organized and existing under a freeholder's charter adopted pursuant to the Constitution of the State of California. In October, 1978, the City Council amended the Santa Monica Fair Elections Practices Ordinance, Santa Monica Municipal Code Sections 11201-215, to provide at Section 11209, that individual contributions to any candidate or ballot measure campaign are limited to no more than two cents times the voting age population (presently, $1,460.60). This provision was adopted pursuant to the City's authority to regulate with respect to municipal affairs, Cal. Const. Art. XI, §5, and is consistent with Section 22808 of the California Elections Code which permits even non-chartered cities to set limits on contributions in municipal elections.

The validity of Santa Monica Municipal Code Section 11209 insofar as it limits contributions to ballot measure campaigns is currently being challenged in an action for declaratory and injunctive relief entitled *Keist v. City of Santa Monica,* Los Angeles Superior Court, Case Number C 271814. On February 28, 1979, plaintiff's request for a preliminary injunction against the enforcement of the ordinance was denied by the Los Angeles Superior Court. A date has not yet been set for trial on the merits.

The issues raised in the Berkeley case are of great importance to the City of Santa Monica, since the outcome of this action will determine the validity of Section 11209 as it applies to ballot measure campaigns. This section was enacted and is believed necessary to ensure that moneyed interests do not dictate local politics in Santa Monica and to maintain broad public confidence and participation in the City's electoral process.

Summary of Argument.

Appellants (hereinafter, "C.A.R.C.") challenge the constitutionality of Section 602 of the Berkeley Reform Act of 1974 as it relates to limitations on the amount of contributions that any ballot measure campaign may submit or accept from any person. Despite the fact that the Berkeley ordinance makes no attempt to limit expenditures either by an individual or a campaign committee, C.A.R.C. argues that the $250 limitation on contributions violates its rights of free speech and association.

The Supreme Court of California reversed decisions of the trial court and the Court of Appeal to uphold the validity of the Berkeley ordinance. *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 167 Cal. Rptr. 84 (1980). In light of the importance of the initiative and referendum to the legislative process in California, and the potential for perversion of that process by unlimited contributions, the Court held the public purpose underlying the $250 limitations on candidate campaign contributions upheld by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976).

C.A.R.C. relies on the alleged distinction between candidate and ballot measure campaigns in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). However, that distinction is only incidental to the Court's determination that no compelling state interest was demonstrated in *Bellotti* to justify total denial of the plaintiff corporations's right to participate in ballot measure elections whether by contributions or direct expenditure.

Even if ballot measure campaigns provide less opportunity for direct purchase of political favors — although even this is open to question in local elections where candidates frequently ride the tails of successful ballot measures — the adverse impact of unlimited contributions on candidate and

ballot measure elections is otherwise identical. In both cases, the actual and perceived domination of the electoral process by the wealthy has the effect of undermining faith in the system and discouraging voters from participating in a process in which they believe they can have only marginal effect.

Indeed, in certain respects, unlimited contributions pose a greater threat to the integrity of the electoral process in ballot measure campaigns. While voters can make a judgment about the character and integrity of a candidate, apart from consideration of his or her backers, it is frequently difficult to gauge the intent and impact of ballot measures without knowing what interests expect to receive the ultimate benefit.

The Berkeley ordinance is precisely tailored to safeguard the electoral process from real or perceived domination by large financial interests while imposing only such restrictions on First Amendment rights as were deemed "minimal" in *Berkeley*.

Within the $250 limitation and to the extent of contributed service which is subject to no restriction, individuals are free to join together in campaign committees whose total expenditures are unlimited. Thus, as the California Supreme Court found, alleged rights of association are limited only in that the Berkeley ordinance does not permit "political contributors to dominate [ballot measure] committees and their campaigns by unconstrained financial pressure." 27 Cal. 3d at 830, 167 Cal. Rptr. at 91. The $250 limitation, in fact, enhances the associational interest of small contributors who would otherwise be powerless to shape presentation of an issue endorsed and presumably framed to the interests of major contributors.

The paramount right to advocate a position is not limited at all. Rather, the contribution limitation simply has the effect of channeling its exercise into direct expenditures. Although there is always a risk that the biggest spenders will have an undue influence on the electoral process, the risk is far less in the case of direct expenditures where the voters are immediately informed not only of a given position but of who or what is advocating it. Thus, direct expenditures, unlike contributions filtered through a faceless committee, have less potential to foster an apathetic electorate, but on the contrary, increase the amount of information available to the discriminating voter.

In sum, at the cost of very little, if any, compromise of legitimate First Amendment interests, the Berkeley ordinance would assure, in a way in which disclosure alone cannot, that the initiative and referendum are not reduced to a means of legitimizing economic domination of the political process.

ARGUMENT.

I.

The Initiative and Referendum Process Is Essential to Democratic Government in California and Must Be Protected From the Undue Influence of Moneyed Interests.

The California Constitution proclaims that "[a]ll political power is inherent in the people." Cal. Const. Art. II, §1. It has often been stated that the "exercise of initiative and referendum is one of the most precious rights of our democratic process." *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563, 11 Cal. Rptr. 340, 344 (1961); *see, e.g., Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976).

The California Supreme Court stressed in its opinion in this case the preeminent importance of the initiative process in California politics, 27 Cal. 3d at 824-25, 167 Cal. Rptr. at 87, and noted that this Court, too, has recognized that " 'California's entire history demonstrates the repeated use of the referendum to give citizens a voice on questions of public policy . . .' " *Id.*, quoting from *James v. Valtierra*, 402 U.S. 137, 141 (1971).

Moreover, almost as old as California's tradition of initiative and referendum, is the history of state efforts to control their abuse by powerful moneyed interests. In 1921, concern over the influence of money in ballot measure campaigns resulted in legislative adoption of a campaign disclosure law. *See* Ch. 483, Cal. Stat. [1921] 983. In *Brown v. Superior Court*, 5 Cal. 3d 509, 96 Cal. Rptr. 584 (1971), in upholding stricter disclosure requirements with respect to ballot measure campaigns, the State Supreme Court traced

the early legislative history of the ballot measure disclosure requirements:

> . . . In 1921, 10 years after the Constitution was amended to provide for the initiative and referendum, the first disclosure provisions governing election campaigns for and against ballot measures was enacted. The following year a special committee of the Senate was appointed to investigate matters relating to the receipt and expenditure of sums of money in excess of $1,000 to secure the passage or defeat of measures appearing on the ballot at the general election in November 1922. It examined and found deficient the disclosure provision which related to ballot measures.

Id. at 520, 96 Cal. Rptr. at 591 (citations omitted).

The Senate Committee's conclusion was prompted by its findings with respect to the seven ballot measure campaigns generally agreed to have been the most fiercely contested:

> The committee might . . . say, as the result of its investigation, "Victory is on the side of the biggest purse." The winning of the election by the side that spent the most money in the . . . contests was too universal to be attributed merely to chance or accident. The power of money in influencing public opinion, its ability to carry popular elections through the expenditures for propaganda, literature, advertising and organized campaign workers was made strikingly manifest in the investigation of your committee. It presents a problem in direct legislation which the citizens of the State cannot safely ignore.

Report of Special Committee, 1923 Journal of the Senate, May 14, 1923, 1780, 1782-83.

The Committee found the problem of undisclosed expenditures exacerbated by "questionable, misleading and deceptive campaign methods." *Id.* at 1785. Among these, it noted:

> . . . the use of high sounding, patriotic names under which the real identity of the interested parties and actual proponents or opponents is disguised. While many campaign committees selected names that fairly indicated their purpose, others selected designations which gave the voter no indication as to the real purpose or nature of the organization. The most conspicuous example of the latter was the use of the name "Greater California League" by the opponents of the Water and Power Act. Such a name readily gives the impression of being a promotion organization which every citizen in California would feel free to join, and having nothing in its name to indicate that it was a political campaign organization.
>
> The testimony before the committees showed that the Greater California League was in reality merely the name under which Eustace Cullinan, employed by the power companies, conducted the campaign against the Water and Power Act in Northern California.

The answer to these problems in 1923 was more stringent disclosure. However, as these same abuses found by the committee in 1923 have persisted over time, disclosure itself has proved an inadequate means of assuring that the initiative and referendum process is not corrupted by the domination of money interests.[1]

In upholding the Berkeley ordinance as motivated by a desire to return vitality to the initiative process, the Cali-

---

[1]The concern has resulted in a variety of disclosure and other reform legislation at the state level. *See* Political Reform Act of 1974, Cal. Govt. Code §§81000 *et seq.*; Waxman-Dymally Campaign Disclosure Act, Cal. Elections Code §§11500 *et seq*. The importance of controlling campaign abuses is reflected in the fact that local governments in California are empowered to adopt requirements more restrictive than those contained in state statutes. *See* Cal. Elections Code §22808; Cal. Govt. Code §81013. The Legislature has specifically provided that a city may "limit campaign expenditures or contributions in municipal elections." Cal. Elections Code §22808.

fornia Supreme Court identified the propensity of "large contributors [to] use the power of their purse to overcome the power of reason, . . ." 27 Cal. 3d at 827, 167 Cal. Rptr. at 88, as thwarting the intended purpose of the initiative and referendum and resulting in the corruption of the electoral process as a whole. *Id.*, 167 Cal. Rptr. at 88-89. It carefully scrutinized the well-documented "nexus between voter apathy and large campaign contributions." *Id.* at 828, 167 Cal. Rptr. at 89, and stated:

> Here, it is argued that the electoral process is similarly corrupted by such contributions because voters lose confidence in our governmental system if they come to believe that only the power of money makes a difference. In another context we recognized the danger of such a loss of confidence: "One disturbing phenomenon of the current political scene of which we may take judicial notice is an apparent substantial increase in voter apathy. The erosion and decay caused by the acid of indifference, unconcern, and lack of participation, if prolonged, may pose a danger to the democratic institutions, far more subtle and invidious than any other." (*Johnson v. Hamilton* (1975) 15 Cal. 3d 461, 471, 125 Cal. Rptr. 129, 134, 541 P.2d 881, 886.)

Id. at 827-28, 167 Cal. Rptr. at 89. *See also Gayle v. Hamm*, 25 Cal. App. 3d 250, 257-58, 101 Cal. Rptr. 628, 634 (1972).

The history of California politics in the 20th century is one of commitment to the initiative process and to preserving the integrity of that process from the adverse effects of unchecked financial influence. It is in this context that C.A.R.C.'s challenge to Section 602 of the Berkeley Election Reform Act must be evaluated.

II.

Ballot Measure Campaign Contributions, Like Contributions to Candidate Campaigns, May Constitutionally Be Limited to Prevent Corruption of the Electoral Process.

This Court has repeatedly stated that First Amendment interests, although entitled to great weight, are not absolute. Thus, even a "significant interference" with protected rights of political expression and association is not invalid "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedom." *Buckley v. Valeo*, 424 U.S. 1 (1976); *Consolidated Edison v. Public Service Commission*, ... U.S. ...., 65 L. Ed. 2d 319, 326 (1980). The First Amendment interests alleged by C.A.R.C. must therefore be evaluated alongside the other legitimate societal interests of a democratic government.

In *Berkeley, supra*, this Court invalidated provisions of the Federal Election Campaign Act of 1971 which limited individual expenditures in support of a candidate, but upheld limitations on individual contributions to candidate campaigns. In so doing, the Court recognized the potential of large contributions to corrupt the political process and the compelling governmental interest in preventing such corruption:

> . . . Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign . . . To the extent that large contributions are given to secure political quid pro quo's from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .

Id. at 27. The Court also identified a substantial governmental interest in preventing that erosion of public confidence in the electoral processes which could result from even the appearance of impropriety.

> Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . [Here,] Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."

Id., quoting from *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 564 (1973).

Significantly, the Court in *Berkeley* specifically found that the limitations on campaign contributions, as opposed to expenditures, "entail[ed] only a *marginal* restriction upon the contributor's ability to engage in free communications." 424 U.S. at 20 (emphasis added).

The Court did not distinguish between contributions and direct expenditures when, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in a sharply divided 5-4 decision, it invalidated a Massachusetts statute which totally prohibited corporations from participating in ballot measure campaigns not directly affecting the corporation's property, business or assets. Thus faced with an enactment which would, except in legislatively defined circumstances, deny to corporations any First Amendment right of political expression, the Court held that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects upon which persons may speak and the speakers who address a public issue." *Id.* at 784-85.

C.A.R.C. seizes upon certain language in the *Bellotti* opinion to support its contention that the *Berkeley* analysis is inapplicable to ballot measure campaign contributions. The Court in *Bellotti*, in rejecting the notion that corporate money and power is inherently destructive of the referendum process, noted that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." 435 U.S. at 790. The remark, which in any event must be read in the context of the total deprivation of First Amendment rights effected by the Massachusetts law, advances C.A.R.C.'s position only if it is assumed that the only justification for limiting contributions is the risk of candidate corruption. This is plainly not the case.

The *Bellotti* Court, itself, recognized other compelling interests which would justify governmental intervention, among them, "[p]reserving the integrity of the electoral process," " 'sustain[ing] the active alert responsibility of the individual citizen . . .' " and "[p]reservation of the individual citizen's confidence in government. . . ." 435 U.S. at 788-89. The basis for the holding in *Bellotti* was that the factual record in that case did not demonstrate that these interests would be furthered by silencing corporate discussion of referendum issues:

> . . . If appellees's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine the democratic process, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

435 U.S. at 789-90 (citations omitted).[2]

By contrast, there is clear evidence that, in California, the domination of ballot measure campaigns by large contributors hiding behind "high sounding, patriotic names," Report of Special Committee, *supra*, at 1785, has thwarted the democratic purposes of the initiative process and contributed to a loss of faith in that system. *See generally* discussion in the opinion of the California Supreme Court, 27 Cal. 3d at 824-29, 167 Cal. Rptr. at 87-90, and Section I, *supra*. Whatever the actual corrupting influence of large contributions on ballot measure campaigns — and we cannot agree that in local elections, where issues and candidates often go hand-in-hand, political favors may not be as readily, if somewhat more discreetly obtained, by supporting a candidate's favorite issue — the perceived potential for economic domination of political processes can not be gainsaid. Indeed, what is public apathy if not tangible evidence that the average voter perceives the electoral process to be a field in which only the rich can meaningfully participate?

---

[2]There is further a strong implication in *Bellotti* that the Court viewed the asserted governmental interests as a sham; thus, in discussing the additional claim that the statute protected the rights of minority shareholders, the Court found this purpose "belied" by the provisions of the statute and noted, with reference to the express statutory bar on corporate discussion of individual taxation issues, that "the legislative may have been concerned with silencing corporations on a particular subject." 435 U.S. at 793.

Similarly, in *Let's Help Florida v. McCrary*, 621 F.2d 195 (5th Cir. 1980), *appeal docketed* No. 80-970 (December 8, 1980), a case which relies on the above-cited language in *Bellotti* to strike down a statutory limitation on ballot measure campaign contributions, there is also a suggestion that the statutory provisions were inconsistent with the governmental purpose alleged. Thus, the court noted that the statute would not advance the alleged disclosure function of the regulation since large contributors were not prevented from forming multiple partisan campaign committees and simply contributing the maximum amount to each. *Id.* at 200.

There are two primary purposes served by limiting contributions to ballot measure campaigns. The first is to assure that small contributors will not be dissuaded from actively participating in the campaign process. In this report, the danger that campaign committees will be dominated by major contributors is the same regardless of whether the pressure is brought to bear on a candidate or ballot measure election. The second purpose is to enable the electorate to evaluate political argument in terms of the interests of those who are its real advocates. In this respect, the potential for abuse is far greater in the context of ballot measure campaigns.

In *Brown v. Superior Court, supra,* the California Supreme Court drew this distinction:

> It is common knowledge that in the majority of cases a candidate for public office has been nominated or endorsed by a political party, the policies of which are widely known. Voters may become aware of candidate's qualifications, in part, through their long-standing knowledge of the candidate's party and of politically oriented personalities who endorse the candidate. A ballot measure, on the other hand, is presented to voters without a historical background of established political support, and voters are unable to make the same quality judgment without knowledge of established persons or entities who or which are the real advocates or opponents of the measure.

5 Cal. 3d at 521. The same rationale which, in *Brown,* was held to justify *stricter* disclosure with regard to ballot measure contributions, refutes C.A.R.C.'s contention that such contributions are less destructive of democratic electoral processes and less subject to regulation than the candidate campaign contributions considered in *Berkeley*.

It is important to note that the *Brown* argument is not based on a paternalistic view but on the realities of political advocacy. Initiative ballot measures are framed by their proponents and campaign committees are formed and christened by those who finance them. Just as the paid voice of the power companies found it politically expedient to campaign under the banner of the "Greater California League," *see* Special Legislative Report, *supra*, so too, a proposed state constitutional amendment on the June 3, 1980 ballot, which would have eliminated existing local rent control measures and restricted the scope of newly enacted rent control legislation, was titled "Rent Control" and sponsored by a coalition of real estate interests under the name Californians for Fair Rents.

If the initiative and referendum are to function as intended as a "vision of direct democracy," *Citizens Against Rent Control, supra*, 27 Cal. 3d at 827, 167 Cal. Rptr. at 88, the process must be perceived by the electorate as fair, incorruptible and accessible, and the electorate itself must be fully informed. Even if large contributions to ballot measure campaigns do not pose a direct threat of candidate corruption, they undercut other governmental interests of equally compelling proportions. These interests, which include maintaining the real and apparent integrity of the electoral process, the encouragement of an active and alert electorate, and the preservation of individual confidence in government, *Bellotti, supra*, 435 U.S. at 788-89, are clearly furthered by the contribution limits contained in Section 602 of the Berkeley Election Reform Act of 1974.

III.

The Berkeley Ordinance Is Narrowly Tailored to Prevent Perversion of the Electoral Process by Moneyed Interest While Imposing Only a Minimal Burden on the Exercise of First Amendment Rights.

Unlike a limitation on expenditures which literally restricts the volume of permissible political activity, a limitation on contributions merely redirects the form which po-

litical activity will take. In *Buckley, supra,* the Court noted that the effect of the limitation was "to require candidate and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." 424 U.S. at 22. The Court also indicated the limited impact of the restriction on individual rights of free expression and association:

> A contribution serves as a general expression of popular support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptively with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may given to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by the contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id. at 24 (citations omitted).

C.A.R.C. argues that contributions to ballot measure campaigns, due more than a symbolic expression of support; it reasons that, unlike contributions to candidate campaigns, such contributions are not filtered through a candidate but translate directly into advocacy of a particular position, although C.A.R.C. hastens to add, contributors "do not necessarily control the specific manner in which their money will be spent." Appellants' Brief at 13.

This attempted distinction raises questions concerning the very effects of contributions on the political process which support the need for regulation. Such contributions were deemed "symbolic" in *Buckley* because they are passed out of the control of the contributor into the hands of a presumably independent campaign committee. To the extent that C.A.R.C. argues that contributions bear a proportionate rather than a symbolic relationship to the conduct of a ballot measure campaign, it would appear to assert a right of "political contributors to dominate such [campaign] committees by unconstrained financial pressure." *Citizens Against Rent Control, supra,* 27 Cal. 3d at 830, 167 Cal. Rptr. at 91. As the California Supreme Court noted, no case has ever recognized such a right within the scope of First Amendment protection. On the contrary, it is the associational interests of small contributors to pool their money and services in a central committee where all contributions have equal symbolic value and weight that require protection. The contribution limitation serves the purpose. At the same time, if as C.A.R.C. appears to argue, ballot measure contributions are distinguishable from contributions to a candidate because they are not transmitted by the process of passing through a committee but retain their character as a "yes or no" vote on a single issue, then what is it appellants would derive from expressing their vote and their message in the voice of a committee? The answer can only be that the committee lends a legitimacy and conveys a sense of broad support for the positions it espouses.

The greater legitimacy of a committee properly exists, however, only to the extent that it is, in fact, a broad-based association of many individual supporters. Conversely, to the extent a committee would speak only for narrow moneyed interests, it is reasonable to deny such interests the prestige of a presumably popularly-based committee and

require them to make direct expenditures and communicate these political messages in their own name. The contribution limitation, in effect, assures that a ballot measure campaign committee is the broad-based popular organ it purports to be. To allow narrow interests to hide behind a "high sounding patriotic name" constitutes a deceptive practice basically antithetical to the intent of the initiative process.

Thus, the contribution limitation infringes only nominally, if at all legitimate First Amendment interests while extenuating the most deceptive, hence the most insidious effects, of financial influence on the electoral process.

C.A.R.C. argues that limitations on contributions "only serve randomly" the interests of preserving the integrity of the political process and eliminating voter apathy, Appellants' Brief at 30, because the influence of large expenditures still is not and cannot be eliminated. It is true that large expenditures may unduly influence an election result; however, they do not pose the same threat to the election process itself. In the same way that disclosure requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *Buckley, supra,* 424 U.S. at 67, requiring moneyed interests to make expenditures directly eliminates voter perceptions that the electoral process is being manipulated by forces which the average voter is incapable of understanding or effecting. Rather than contributing to voter apathy, rechanneling large money into direct expenditures increases the amount of information available to the public and encourages the electorate to take a more active and vigilant role in ballot measure campaigns. ". . . [w]hen political views are expressed directly by individuals and corporations rather than indirectly or covertly through committees, the voters are immediately made aware of the interested parties and can evaluate their motivation."

Citizens Against Rent Control, 27 Cal. 3d at 831, 167 Cal. Rptr. at 91.

At the same time, by preventing large contributions from being funneled through nominally independent campaign committees, the contribution limitations ensures that all contributors to such committees will have equal value and, thus, encourages wider involvement in the campaign process.

Although in some respects contribution limitations serve many of the same functions as disclosure, the Court many accept the legislative judgment as it did in *Buckley, supra*, that "disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." 424 U.S. at 28. As the California Supreme Court pointed out, even with disclosure requirements, ". . . the campaign propaganda and the identification are not simultaneous: inducements are disseminated and voter impressions are formed substantially before the sources of committee financing are revealed." *Citizens Against Rent Control, supra*, 27 Cal. 3d at 831, 167 Cal. Rptr. at 91. Thus, it concluded, "mere disclosure" is insufficient to secure the fundamental purpose of the initiative to make the electoral process accessible to the people. *Id.*

The Berkeley ordinance is precisely tailored to "restrict the one means [of engaging in political activity] that represents a danger rather than an aid to the electoral process." *Id.* Having failed to demonstrate more than the "minimal" restriction of First Amendment rights upheld in *Berkeley, supra*, appellants can claim no community from the compelling societal purposes that support Section 602.

> [O]ur democracy has moved a long way from the town hall, one man, one vote conception of our Framers. Politics has become a growth industry and a way of life for millions of Americans. The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant; we have failed to remind ourselves, as we moved from town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people.

Buckley v. Valeo, 519 F.2d 821, 897 (D.C. Cir. 1975) (en banc), *aff'd. in part*, 424 U.S. 1 (1976).

IV.
Conclusion.

Section 602 of the Berkeley ordinance does not purport to equalize the political voice of all members of the society. *Cf. Bellotti, supra*, 435 U.S. at 790-91. Moneyed interests can still buy more airtime and newspaper space and paid political workers to espouse their points of view. What Section 602 does attempt to do is to assure that big money does not, in effect, raise the ante in the political game so that the average voter cannot or — almost as bad — believe he or she cannot meaningfully participate. This purpose, essential to preserve the initiative process as a dynamic realization of democratic ideals, is precisely served by the contribution limitation with little or no infringement of any protected First Amendment interest.

For these reasons, the City of Santa Monica as amicus curiae respectfully requests that the decision of the California Supreme Court upholding the validity of Section 602 be affirmed.

Dated: July 9, 1981.

Respectfully submitted,

ROBERT M. MYERS,
City Attorney,
STEPHEN S. STARK,
Assistant City Attorney,
SUSAN L. CARROLL,
Deputy City Attorney,
Attorneys for Amicus Curiae
City of Santa Monica, California.